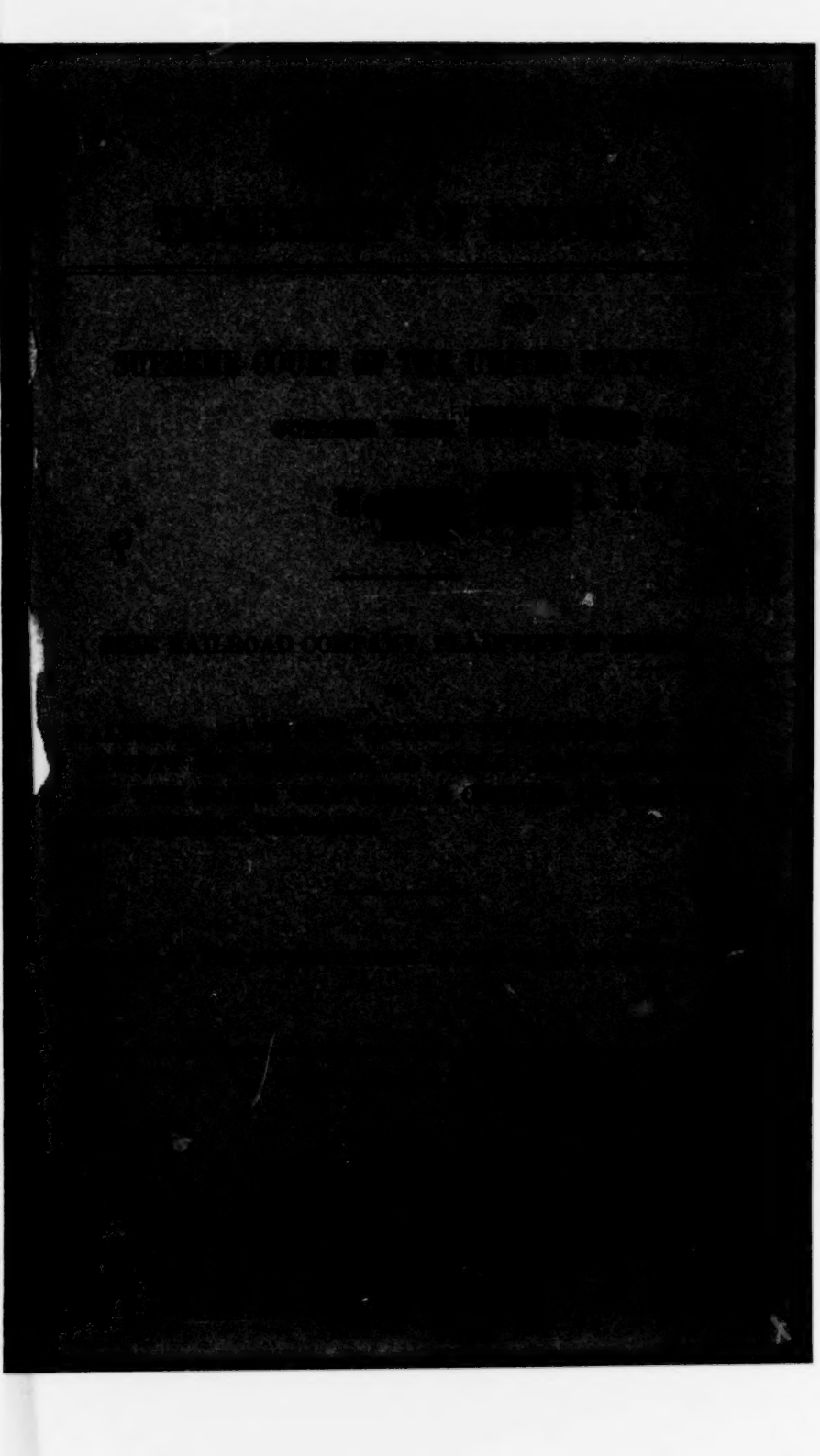

(25,733)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 903.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WALTER G. HAMILTON, COUNTY TREASURER OF THE COUNTY OF ROCKLAND, AS PUBLIC ADMINISTRATOR OF THE GOODS, CHATTELS, & CREDITS OF STEPHEN MISTSCHOOK, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 28" day of November, in the year of our Lord one thousand nine hundred and sixteen, before the Judges of said Court.

Witness The Hon. Willard Bartlett, Chief Judge, presiding.

R. M. BARBER, *Clerk.*

Remittitur, Nov. 29, 1916.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Adm'r, &c., Respondent,

ag'st

ERIE RAILROAD COMPANY, Appellant.

Be it remembered, That on the 20th day of August in the year of our Lord one thousand nine hundred and fifteen Erie Railroad Company the appellant in this action, came here into the Court of Appeals, by Stetson, Jennings & Russell its attorneys, and filed in the said Court a Notice of Appeal, and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, and Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Adm'r &c. the respondent in said action, afterwards appeared in said Court of Appeals by Charles C. Sanders his attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

b Whereupon, The said Court of Appeals having heard this cause argued by Mr. William C. Cannon of counsel for the appellant, and by Mr. Frederick C. Scofield of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And -hereupon, as well the Notice of Appeal and return thereto

aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, Nov. 29, 1916.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

1 New York Supreme Court, Appellate Division, First Department.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrater of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff-Respondent,

against

ERIE RAILROAD COMPANY, Defendant-Appellant.

Statement under Rule 41.

This action was begun by the service of a summons upon the defendant on the 2nd day of March, 1911. The complaint herein was served on the 24th day of April, 1911. The amended answer herein was served on the 29th day of November, 1911.

The plaintiff has appeared by Charles C. Sanders. The defendant has appeared by Stetson, Jennings & Russell. There has been no change of parties or attorneys.

2 *Notice of Appeal.*

Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Please take notice, that the defendant, Erie Railroad Company, hereby appeals to the Appellate Division of the Supreme Court for

the First Department, from the judgment of this Court entered herein in the office of the Clerk of the County of New York, on the 27th day of March, 1914, which judgment was in favor of the plaintiff and against the defendant for the sum of six thousand dollars ($6,000) damages, and the sum of one thousand eight hundred and twenty-four dollars ($1,824) interest, and the sum of two hundred and forty-two and 86/100 dollars ($242.86) costs, making in all the sum of eight thousand and sixty-six and 86/100 dollars ($8,066.86); that the defendant also appeals from the order denying defendant's motion to set aside the verdict and for a new trial, entered herein in the office of the Clerk of the County of New York, on the 28th day of March, 1914, and that the defendant also appeals from the order denying the defendant's motions to
3 dismiss the complaint entered herein in the office of the Clerk of the County of New York, on the 21st day of April, 1914; and that the defendant appeals from each and every part of said judgment and said orders.

Dated, New York, April 22, 1914.

Yours, etc.,

STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant,
15 *Broad Street, Borough of Manhattan,*
New York City, N. Y.

To William F. Schneider, Esq., Clerk of the County of New York; Charles C. Sanders, Esq., Attorney for Plaintiff, 206 Broadway, Borough of Manhattan, New York City, N. Y.

4 *Summons.*

Supreme Court, County of New York.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Trial desired in the County of New York.

Dated, March 1st, 1911.

CHARLES C. SANDERS,
Plaintiff's Attorney.

Office and Post Office Address, 206 Broadway, Manhattan, New York City, County, N. Y.

5 *Complaint.*

Supreme Court, County of New York.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

The plaintiff, by Charles C. Sanders, his attorney, for complaint herein respectfully shows to the Court, and alleges on information and belief as follows:

I. That the defendant is a domestic corporation.

II. That at the times hereinafter mentioned the defendant was engaged in the operation of a certain steam railroad known as the Erie, in the County of Rockland and elsewhere in the State of New York, as the owner, lessee or otherwise of the tracks, cars, locomotives and other appurtenances thereto belonging, having the custody, charge and control thereof.

III. That the defendant's said railroad is laid down and operated between Sloatsburg and Suffren in said County of Rockland, across a certain highway known as the Haverstraw Road, at or near the Sloatsburg station of said defendant.

6 IV. That on or about the third (3rd) day of March, 1909, Stephen Mistschook was travelling in a vehicle drawn by two horses along the said public highway known as the Haverstraw Road and when he reached the place where said railroad crosses said highway near the said Sloatsburg station he attempted with due care and caution and without any negligence on his part, to drive over the defendant's tracks and while so proceeding, the defendant carelessly and negligently in the operation of its said railroad, caused one of its locomotives with a train of cars attached thereto to approach said crossing and then and there to pass rapidly over the track of said railroad; and negligently and carelessly omitted to give any warning thereof or to give any signal by ringing the bell or sounding the whistle of said locomotive and carelessly and negligently failed to maintain gates or any barrier at said crossing or to have a flagman at said place and allowed the signal bell which customarily was rung when trains came in dangerous proximity to said crossing, to be removed or get out of order so that it failed to ring and by reason thereof the said Stephen Mistschook was unaware of the approach of said locomotive and train of cars; and he and the horses he was driving were killed and the vehicle was broken by being struck by the said locomotive and thrown a great distance.

V. That the death of said Stephen Mistschook was caused as aforesaid wholly by the negligence of the defendant in the operation of its railroad and without negligence on his part.

VI. That the said Stephen Mistschook was at the time of his death

a resident of Rockland County and left him surviving a widow and three minor children, Eva Mistschook, Julien Mistschook and Elarion Mistschook, all dependent upon him for support and all aliens, resident in Russia, Europe; and by reason of his death as
7 aforesaid they suffered damages in the sum of twenty-five thousand ($25,000) dollars.

VII. That on or about the first (1st) day of March, 1911, the plaintiff was duly appointed the administrator of the goods, chattels and credits of said Stephen Mistschook, deceased, by the Surrogate of Rockland County, New York, by whom letters of administration were thereupon issued to plaintiff and have not been revoked and plaintiff is still qualified to act as such administrator.

Wherefore, plaintiff demands judgment herein against the defendant for the sum of twenty-five thousand dollars damages with interest and the costs of this action.

CHARLES C. SANDERS,
Attorney for Plaintiff, 206 *Broadway*,
Manhattan, N. Y. City.

STATE OF NEW YORK,
County of New York, ss:

Charles C. Sanders, being duly sworn, says: That he is the attorney for the plaintiff in the above entitled action: that he has read the foregoing complaint and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true. That the sources of his information and the grounds of his belief are interviews with persons and investigations of facts which he caused to be made and reported to him; and the reason why this affidavit is made by him and not by the plaintiff is because the latter is not within the County of New York
8 where deponent has his office, and capable of making this affidavit.

CHAS. C. SANDERS.

Sworn to before me this 22nd day of April, 1911.

CORNELIUS O. McLAUGHLIN,
Notary Public, Kings County.

Cert. filed in N. Y. Co.

Amended Answer.

New York Supreme Court, County of New York.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

The defendant herein, appearing by Stetson, Jennings & Russell, its attorneys, for its amended answer to the complaint herein, alleges, upon its information and belief, as follows:

First. Referring to Paragraph IV of the complaint herein,
9 defendant denies the allegations, and each of them, therein contained, except that it admits that on or about the 3d day of March, 1909, Stephen Mistschook, while traveling in a vehicle drawn by two horses, came into collision with a locomotive of the defendant, at or about the second highway crossing west of the station of Sloatsburg, and except that it admits that said Stephen Mistschook and the horses he was driving were killed.

Second. Referring to paragraph V of the complaint herein, the defendant denies the allegations, and each of them, therein contained.

Third. Referring to paragraphs VI and VII of the complaint herein, the defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, except that it denies that the widow and children of deceased have been damaged in the sum of $25,000, or in any other sum, for which defendant is responsible.

Fourth. And the defendant, by its further answer to the complaint, and as a defense thereto, avers that Stephen Mistschook, the deceased, was, at the time of his death, a subject of His Majesty, the Emperor of all the Russias; that on or about October 6, 1909, P. d'Adomovitch, as Vice-Consul, acting for the Russian Imperial Consul-General, a duly accredited representative of the Imperial Government of Russia to the United States, and re-sident in New York City, New York, lawfully acting on behalf of the widow and next of kin of the said deceased, voluntarily accepted from the defendant the sum of four hundred dollars ($400) in full payment of all damages sustained by said next of kin by reason of the death of said Stephen Mistschook, on or about March 3, 1909, and thereupon he executed
in due form of law a general release to this defendant from all
10 cause and causes of action, debts, damages, claims and demands whatsoever, including such as had arisen by reason of the death of Stephen Mistschook on or about the 3rd day of March, 1909.

Fifth. That the defendant on or about the 6th day of October, 1909, and prior to this action made full settlement with the said P.

d'Adomovitch, on behalf of the widow and next of kin of the said deceased, for all injuries and damage which had been sustained by the said next of kin by reason of the death of said deceased on or about March 3rd, 1909, and paid him the sum of four hundred dollars ($400) in full payment, accord and satisfaction thereof and at the time of such settlement, release, accord and satisfaction, took and received from the said P. d'Adomovitch, as representing the said widow and next of kin, a general release, duly executed, from all claims which theretofore did or may have existed in favor of the widow and next of kin of Stephen Mistschook, deceased, against the defendant on account of any matter or thing whatsoever. That by reason of the facts herebefore averred the plaintiff ought not to have or maintain this action against the defendant.

Sixth. The defendant further avers that the deceased was, at the time of his death, a subject of the Emperor of Russia. That no notice of the plaintiff's application to the Surrogate of Rockland County, State of New York, for letters of administration alleged to have been issued to the said plaintiff by the said Surrogate of Rockland County, on March 1, 1911, was given to the Emperor of Russia, or his duly authorized representatives, residing in the United States, or any of them, or to the Imperial Russian Consulate-General of New York, at the City of New York, New York, within whose
11 district the said deceased died, and that no citation was issued to, or served upon, the said Consulate-General by the said Surrogate of Rockland County before the issuance of said letters of administration. That neither the said Imperial Russian Consulate-General, resident in the City of New York, New York, nor any one in his behalf, nor any representative of the Emperor of Russia, has, at any time, waived the right to such notice, citation, or the right to appointment as administrator of the said deceased.

That under and by virtue of the treaties between the United States and the Emperor of Russia, and the laws in such case made and provided, the said Imperial Russian Consulate-General, resident in New York City, New York, had the right to administration upon the estate of the said deceased, and that he has not at any time heretofore relinquished that right. That by reason thereof the plaintiff has not legal capacity to sue, or to maintain this action.

Wherefore, the defendant demands judgment that the complaint be dismissed, with costs and disbursements to the defendant.

STETSON, JENNINGS & FUSSELL,
Attorneys for Defendant, 15 Broad Street,
Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

J. E. Packer, being duly sworn, deposes and says: That he is the assistant secretary of the defendant above-named; that he has read the foregoing amended answer and knows the contents thereof and that the same is true to his own knowledge, except as to the matters

therein stated to be alleged on information and belief and
12 that as to those matters he believes it to be true.

J. E. PACKER.

Sworn to before me this 2nd day of December, 1911.

WM. H. BRUDER,
Notary Public, #165, New York County.

Extract from Minutes.

No. 14.
1838. APRIL 11th, 1914.

Supreme Court, Trial Term, Part VI.

WALTER G. HAMILTON, County Treas. of the County of Rockland, etc.,

against

ERIE RAILROAD COMPANY.

I hereby certify that this cause was tried before Hon. Edward J. Gavegan and a jury, on the 8th, 9th and 12th days of January, 1914, and the Court directed a verdict in favor of the plaintiff for the sum of $6,000.

Motion by defendant to set aside the verdict and for a new trial. Decision reserved.

Mch. 24/14. Motion denied. Defendant may have thirty days' stay of execution and sixty days to make a case.

WM. F. SCHNEIDER, *Clerk.*

13 *Judgment.*

Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

The issues in this action having duly come on for trial, and having been tried on the 8th, 9th and 12th days of January, 1914, before Hon. Edward J. Gavegan and a jury at a Trial Term, Part VI of this Court, and the proofs of the respective parties having been taken, and both parties having, at the close of the case, moved for a direction of a verdict, and the Court having directed a verdict in favor of the plaintiff and against the defendant for the sum of six thousand

($6,000) dollars, and the jury having rendered its verdict in favor of plaintiff and against the defendant by direction of the Court for the sum of six thousand ($6,000) dollars, and the interest upon the said verdict from the 3rd day of March, 1909, the day of the death of plaintiff's intestate to and including the date of the entry of this judgment, having been computed by the Clerk at the sum of one thousand eight hundred twenty-four ($1,824) dollars, and the costs of the plaintiff having been taxed at the sum of $242.86;

14 Now, on motion of Charles C. Sanders, attorney for the plaintiff, it is

Ordered and adjudged, that the plaintiff, Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the goods, chattels and credits of Stephen Mistschook, deceased, recover of the defendant, Erie Railroad Company, the sum of six thousand ($6,000) dollars, the verdict so found by the jury aforesaid, with the sum of one thousand eight hundred twenty-four ($1,824) dollars interest so computed by the Clerk as aforesaid, together with the sum of two hundred forty-two 86/100 ($242.86) dollars costs as taxed, aggregating the sum of $8,066.86, and that he have execution therefor.

Dated, New York, Borough of Manhattan, City of New York, March 27, 1914.

WM. F. SCHNEIDER, *Clerk*.

15 *Order Denying Motion for New Trial.*

At a Trial Term, Part VI of the Supreme Court of the State of New York, Held in and for the County of New York, at the County Court House, Borough of Manhattan, New York City, on the 28th Day of March, 1914.

Present: Hon. Edward J. Gavegan, Justice.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff.

against

ERIE RAILROAD COMPANY, Defendant.

The issues in this action having duly come on for trial, and having been tried on the 8th, 9th and 12th days of January, 1914, before the Court and a jury, and the proofs of the respective parties having been taken and both parties having moved for a direction of a verdict by the Court, and the jury having rendered its verdict by direction of the Court in favor of plaintiff and against the defendant for the sum of six thousand ($6,000) dollars; and the justice presiding at the trial aforesaid having at the same term, and immediately after the rendition of the said verdict, entertained a motion on his minutes on behalf of defendant to set aside said verdict and for a new trial upon

the exceptions taken by defendant at the trial, because the
16 verdict is contrary to the evidence and contrary to law, and is for excessive damages, and after hearing William C. Cannon, Esq., of counsel for defendant, for the motion, and Herbert C. Smyth, Esq., of counsel for the plaintiff, opposing the motion, it is

Ordered, that the defendant's said motion be, and the same is hereby in all respects denied.

Enter,

E. J. G., *J. S. C.*

Order Denying Motions to Dismiss.

At a Trial Term, Part VI Thereof, of the Supreme Court, Held in and for the County of New York, on the 21st Day of April, 1914.

Present: Honorable Edward J. Gavegan, Justice.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

This action having duly come on for trial on the 8th day of
17 January, 1914, before the Honorable Edward J. Gavegan, Justice, and a jury, in Trial Term, Part VI, of the Supreme Court, for the County of New York; and this action having been tried on the 8th, 9th and 12th days of January, 1914; and the counsel for the defendant having moved to dismiss the complaint at the end of the plaintiff's case, on each and all of the following grounds: (1) The plaintiff has failed to establish a cause of action against the defendant; (2) That the plaintiff has failed to prove that the deceased was free from contributory negligence; (3) That it affirmatively appears that the deceased was guilty of contributory negligence; (4) That there is no proof whatever that the deceased looked or listened before attempting to cross the track; (5) That the plaintiff has not the right to sue in this action; and the Court having reserved decision on said motion, and the counsel for the defendant at the end of the whole case having renewed the motion to dismiss the complaint made at the end of the plaintiff's case, and also having moved to dismiss the complaint on all the evidence on each and all of the following grounds: (1) That plaintiff has failed to establish a cause of action against the defendant; (2) That the plaintiff has failed to prove that the deceased was free from contributory negligence; (3) That it affirmatively appears that the deceased was guilty of contributory negligence; (4) That there is no proof whatever that the deceased looked or listened before attempting to cross the track; (5) The alleged cause of action set forth in the complaint has been settled and satisfied, and the release and receipt of the Russian Vice-

Consul constitute a bar to this action; (6) The plaintiff has not legal capacity to sue or to maintain this action, for the reason that the Surrogate of Rockland County had no jurisdiction or right to issue letters of administration to the plaintiff; (7) On all the evidence
18 in the case, the plaintiff is not entitled to recover; And after hearing William C. Cannon, Esq., of counsel for the defendant, in support of said motions, and Herbert C. Smyth, Esq., of counsel for the plaintiff, in opposition thereto;

Now, on motion of Charles C. Sanders, Esq., attorney for the plaintiff, it is

Ordered, that the said motions to dismiss the complaint be, and the same hereby are denied with exceptions to the defendant.

Enter,

E. J. G., *J. S. C.*

19 *Case and Exceptions.*

Supreme Court, New York County, Trial Term, Part VI.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

NEW YORK, January 8th, 1914.

Before Hon. Edward J. Gavegan, Justice, and a Jury.

Appearances:

Charles Sanders, Esq., by Herbert C. Smyth, Esq., of counsel for plaintiff.

Messrs. Stetson, Jennings & Russell, by W. C. Cannon, Esq., of counsel for defendant.

A jury was duly empanelled and sworn.

(Opening address of Mr. Smith taken on the minutes by the stenographer, at the request of defendant's counsel.)

Mr. Smyth: May it please the Court and gentlemen of the jury:
The man who was killed was named Stephen Mistschook. He
20 came to this country from Russia, and was working up in Rockland County, in the Town of Sloatsburg, for a contractor or a man who did a great deal of team work, for a man by the name of Waldron.

We expect to show he was a sober and industrious man and had been working there for some time with a great deal of satisfaction on the part of his employer, and had arranged, about the time of his taking off, to bring his family and wife and three little children to this country, having already hired a place for them to live in, and

had saved up a little money which he was about to send to bring them here.

* * * * * * *

It seems after this accident happened, the railroad endeavored to make a settlement, not through the relatives at all, but through the Russian Consul, and for that purpose had deposited the sum of $400 and had received some kind of a receipt from the Russian Consul, and it was sent to the village authorities in Russia there, to either be paid to the widow and children or to await the children coming of age, and they insist under the treaty between the United States and Russia, as in force at that time, that that is a settlement of this litigation.

* * * * * * *

I trust I have made my side of the case clear to you, that what we desire is an adequate verdict against this road for maintaining an unguarded crossing with an express train approaching it in the early morning, on a misty morning, when the distance might be misjudged by a person who had already taken the precaution to stop within twenty-five feet of the track, and had no other warning of the approaching train, the noise of the approaching train being doubtless obscured by the continuous ringing of this bell on the other
21 side of the track, luring him doubtless to his death, an honest, hard-working father, who had the welfare of his children so much at heart that he had already provided for bringing them to this country to make them citizens of this great country.

(Mr. Cannon then addresses the jury, opening the case in behalf of the defendant.)

Mr. Smyth: I offer in evidence the letters of administration.

Mr. Cannon: I object to the letters of administration upon the ground that they are incompetent, irrelevant and immaterial. I have raised the question in my answer as to whether or not the plaintiff had the right to sue here, in that no citation was served upon the Russian Consul in this city in whose jurisdiction this accident occurred.

Our position is that the Russian Consul had the first right of administration here, there being no heirs in the country, and the citation was not served upon him, and in the absence of that, the Surrogate did not have the right to issue the letters to the public administrator.

* * * * * * *

The Court: I should suppose the real purpose of the provision was to protect heirs next of kin, but where they themselves take the initiative in asking for the appointment of an administrator, they apparently waive that advantage. That would appear to be done in this country. Apart from the question of its being a collateral attack, I think I will overrule the objection.

Mr. Cannon: Exception.

Received in evidence and marked Plaintiff's Exhibit No. 1.

Mr. Smyth: I now offer to read the deposition of United States Consul at Odessa, Russia, upon a commission issued out of this court, upon interrogatories and cross-interrogatories (reading):

22 "Deposition of this witness produced, sworn and examined under oath the 20th day of March, 1912, at the consulate of the United States of America, at Odessa, Russia, under and by virtue of a commission issued out of the Supreme Court of the State of New York, in a certain case or cause therein depending and at issue, between Walter G. Hamilton, as Public Administrator of the goods of Stephen Mistschook, as plaintiff, and the Erie Railroad Company, defendant, in the manner following:

"First interrogatory: What is your name, age and place of residence?

A. My present name is Irene Greetzug. I am thirty-five years of age, and reside in the Village of Ozero, Province of Volhynia.

"Second interrogatory: Where did you live on the 3rd day of March, 1909, and how long had you lived there?

A. I lived in the Village of Ozero. I had lived there twelve years.

"Third interrogatory: Did you know Stephen Mistschook in his lifetime?

"Answer to third interrogatory: Yes.

"Fourth interrogatory: Were you related to said Stephen Mistschook? If you answer you were related to him, please state what your relations were?

"Answer to fourth interrogatory: Yes; I was his wife.

"Fifth interrogatory: Please state when and where you were married to him?

"Answer to fifth interrogatory: I was married to Stephen Mistschook in the Ozero Village Church, November 3rd, 1896.

"Sixth interrogatory: Do you know the age of Stephen Mistschook? If so, please state how old he was on the 3rd day of March, 1909?

"Answer to sixth interrogatory: Yes; we were about the same age. On the 3rd day of March, 1909 he was about thirty-two years of age.

23 "Seventh interrogatory: Do you know the date of birth of Stephen Mistschook?

"Answer to seventh interrogatory: No.

"Eighth interrogatory: Please state how old he appeared to be when you were married to him?

"Answer to eighth interrogatory: About my own age.

"Ninth interrogatory: Did you have any children of your marriage to Stephen Mistschook? Please state their names and the dates of their different births?

"Answer to ninth interrogatory: Yes. Three. Eva, thirteen years of age, born August 30, 1898; Julian, eleven years of age, born June 27th, 1901; Illiarian, eight years of age, born October 24, 1903.

"Tenth interrogatory: When and where did you last see said Stephen Mistschook?

"Answer to tenth interrogatory: When he last said good-bye to me in the Village of Ozero.

"Eleventh interrogatory: Did Stephen Mistschook make any statement to you about his intentions to leave Russia and go to the United States of America?

Answer to eleventh interrogatory: Yes.

"Twelfth interrogatory: Do you know that Stephen Mistschook left Russia, and state when he departed, and if he told you where he intended to go, to locate and live?

"Answer to twelfth interrogatory: I am quite certain he left Russia about five years ago, a few weeks before the beginning of Lent. When he left me, he told me he was leaving for America.

"Thirteenth interrogatory: Did Stephen Mistschook ever write to you after he left Russia?

"Answer to thirteenth interrogatory: Yes, I afterwards received letters from him mailed from New York City and Sloatsburg, New York. He said he was working at Sloatsburg, New York, for a man named Waldron.

24 "Fourteenth interrogatory: Did you ever write to Stephen Mistschook after he told you that he intended to leave Russia? Please state how you directed your letter to him, giving the name of the place where he received mail matter, and if you addressed your letter in care of any one else, please state the name of such person?

"Answer to fourteenth interrogatory: Not being able to write, I had others write for me. My letters were directed according to the address given in my husband's letter to me—all of them to Post Box 149 Sloatsburg, New York.

"Interrogatory No. 15: Please state if you directed your letters in accordance with instructions to you?

"Answer to fifteenth interrogatory: Yes.

"Sixteenth interrogatory: Do you know where Stephen Mistschook was employed immediately prior to the third day of March, 1909, and state the name of his employer?

"Answer to sixteenth interrogatory: I believe and have understood that he was in the employ of Mr. Waldron up to the time and day of his death.

"Seventeenth interrogatory:——"

Mr. Cannon: I object to the seventeenth and eighteenth interrogatories and answers thereto as incompetent, irrelevant and immaterial.

Mr. Smyth: I will ask the other side now to stipulate that the deceased met his death on the 3rd day of March, 1909, by reason of a collision at the place mentioned in the complaint.

Mr. Cannon: I think that has already been stipulated, if not, it is so stipulated.

Mr. Smyth: I think it is proper to show that the widow got notice of his death. That is all the seventeenth interrogatory is, that part

giving the contents of Mr. Waldron's letter, I suppose, would
25 not be competent. I will refrain from reading the contents of Mr. Waldron's letter, if that is the point of their objection.

"Seventeenth interrogatory: Did you receive notice from any one in the United States informing you that your husband was dead? If you have the writing, produce it?

That part of the answer which I will read is as follows:

"Answer to seventeenth interrogatory: Yes; the notice was in the letter from Mr. Waldron."

The Court: That suffices your purpose.

Mr. Smith: Yes, that suffices my purpose except I want to say where it came from.

Mr. Cannon: Sloatsburg, New York.

Mr. Smyth: It came from Sloatsburg, New York.

"Nineteenth interrogatory: When did you last hear from your husband?

"Answer to nineteenth interrogatory: I cannot exactly remember, but think it was about a fortnight before I received Mr. Waldron's letter informing me of my husband's death, and being killed by a railroad train."

Mr. Cannon: I object to the twentieth direct-interrogatory, and the answer thereto, on the ground it is incompetent, irrelevant and immaterial.

Mr. Smyth: This was before there was any motive for writing, so far as the railroad was concerned, because the man was not killed and was alive and had no reason to believe his wife was going to succeed to a cause of action against the road, so what he wrote her with regard to his intentions certainly is relevant.

The Court: You might confine it to the children.

26 Mr. Smyth: No, the letter itself is annexed to the original deposition, at least it so states. If the letter is there, the letter itself would be the best evidence. Exhibit 1, it is called.

The Court: What would be the purpose of offering such a letter?

Mr. Smyth: Any evidence which tends to show the condition of life of the deceased and his family at the time of his death would be relevant. This is evidence showing that they were not to be foreigners any longer, but they were to come here.

Mr. Cannon: I object to that statement.

Mr. Smyth: It shows the intention. If any letter had been written after the accident, it would not be competent, but it goes to show the care he was taking of his family and intended to take. Those are all circumstances that are proper.

The Court: Isn't there a presumption that he was going to do these things?

Mr. Smyth: There is no presumption as to where he was going to do them.

Mr. Smyth: If your Honor please, we will pass the twentieth in-

terrogatory, and answer at this time until we can have the letter translated.

"Twenty-first interrogatory. Please state whether or not you are dependent upon your husband for your support and for the support of your children, and what did your husband contribute to your support prior to the 3rd day of March, 1909, from the time he left Russia, and for a year prior to March 3, 1909, in what way it was sent to you, and from what place it was sent by him.

"The Witness: Yes, yes. I cannot remember the exact sums, but know that once he sent me 300 rubles and at other times sums of 120 rubles, in all about 600 rubles. I cannot remember the exact amount. It was sent to me through the post from Sloatsburg, New York."

27 Mr. Smyth: That would be for one year he sent 600 rubles. How much is a ruble, Mr. Interpreter?

Mr. Connes (the interpreter from the City Court): Fifty cents.

Mr. Smyth: That would be three hundred dollars for the year. Is that conceded?

Mr. Cannon: Yes, conceded, subject to correction.

Mr. Smyth (reading):

"Interrogatory No. 22. Did you ever receive any money or anything of value from the defendant Erie Railroad Company on account of the death of your husband?

"Answer to twenty-second interrogatory. No, I have never received any money or anything of value from the Erie Railroad Company on account of the death of my husband."

Mr. Smyth: The rest of the twenty-second interrogatory is:

"State whether or not you authorized procedure to be instituted against the said railroad to recover damages for the death of your husband and if this action was thereupon brought.

"Answer to twenty-second interrogatory. I authorized the bringing of a suit against the Erie Railroad Company to recover damages for the death of my husband and this action is being brought as the result of my authorization."

Mr. Smyth: The twenty-third interrogatory is the omnibus clause, if she knows anything concerning the matters which tend to the benefit and advantage of the plaintiff.

The answer to the twenty-third interrogatory is: "I don't remember any more just now. I think I have told all I can remember."

Mr. Cannon: I will read the cross-interrogatories, or some of them.

28 "First cross-interrogatory. Have you ever been in the United States of America? If so, state during what period of time you remained there and in what place of said country.

"Answer to first cross-interrogatory. No.

"Second cross-interrogatory. State how you know the age of Stephen Mistschook.

"Answer to second cross-interrogatory. My husband, my father, and the priest told me at the time of our marriage, and I learned

when we told the priest our ages when we were filling out the marriage certificate.

"Eighth cross-interrogatory. Did you earn any money after the said Stephen Mistschook left Russia and before March 3, 1909?

"Answer to eighth cross-interrogatory. No, nothing.

"Tenth cross-interrogatory. Did you ever receive any money or anything of value whatever from the Imperial Government of Russia or from any representative of the Emperor of Russia, either directly or indirectly, for or on account of the death of Stephen Mistschook; if so, state when you received it, and how much you received.

"Answer to tenth interrogatory. No, nothing.

"Eleventh cross-interrogatory. Did you, or did you not receive any money or thing of value from the Justice of the Peace of the First District of the County of Luck, either directly or indirectly, for or on account of the death of said Stephen Mistschook? If so, state when you received it and how much you received.

"Answer to eleventh cross-interrogatory. The Justice of the Peace of Luck deposited 770.80 rubles in the Imperial Savings Bank at Luck to the credit of Stephen Mistschook's heirs. It was deposited March 30, 1910, but I think it arrived some little time be-
29 fore. It was sent to the Governor of Volhynia, and by him to the Justice of the Peace at Luck, I believe. I refused to accept it as compensation for the loss of my husband, having three children upon my hands to educate. It is still untouched in the bank.

"Fourteenth cross-interrogatory. Have you been married since March 3, 1909? If so, state when you were married, and to whom.

"Answer to fourteenth cross-interrogatory. Yes, I was married in the month of September, I think on the 10th day of the month, 1910, to Gregori Greetzug, in the Village of Ozero."

BENTON WALDRON, called as a witness in behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. Smyth:

Q. What is your occupation?
A. Teaming and trucking.
Q. Where do you live and carry on your business?
A. Sloatsburg, New York.
Q. How long have you been a resident of Sloatsburg?
A. Eighteen years.
Q. Did you know Mistschook in his lifetime?
A. Yes, sir.
Q. When did you first know him?
A. 1907.
Q. How did you come to be acquainted with him?
A. I hired him to work for me.
Q. You hired him from what time down to what time?
A. 1907 to 1909, in March.
Q. What did he do for you?

A. Drove a pair of horses, drove a team.
Q. What wages did he get from you?
A. $10 a week.
Q. Did he get any board, or was it simply $10 flat?
A. $10.
Q. What kind of a man was he as to industry and sobriety?
A. He was a good, sober, industrious man, and trusty.
Q. Did he work for you constantly from the time you employed him in 1907 until the day of his death?
A. Yes.
Q. Did you see him daily during that time?
A. Yes.
Q. You had no complaint to make of him?
A. None.
Q. What was the condition of his health?
A. Good.
Q. Do you know whether he had occasion often to cross the tracks of the defendant company on the Haverstraw Highway?
A. Yes, sir.
Q. I show you Plaintiff's Exhibit No. 1 for identification, that being the mark given to it in the deposition heretofore taken, and I ask you if that shows the Haverstraw Highway crossing the Erie Railroad at the place where the accident occurred?

(The witness examines the photograph handed him by counsel.)

A. Yes, sir.
Q. Which resulted in Mistschook being killed?
A. Yes, sir.
Q. Does it correctly represent it as of the 3rd of March, 1909?
Mr. Cannon: Unless he knows where the view is from—I have not seen it.

Mr. Smyth: Yes, it is looking at it the same way that Mistschook took across the tracks (handing the photograph to defendant's counsel.)
May I offer that in evidence?
Mr. Cannon: I object to it. I do not think the witness is competent to testify what this photograph is.

By the Court:

Q. Can you state in what direction trains on the nearest tracks run?
A. I don't understand the question.
Q. Can you state in what direction here to the right or the left the trains on this nearest track run?
A. Yes.
Q. In what direction do they run?
A. East and west.

By Mr. Smyth:

Q. That is both tracks?
A. Oh.

Q. The Judge wants to know the first track you come to in the picture?
A. East.

By the Court:

Q. Trains on that track run east?
A. Yes.
Q. Then that is the east bound track?
A. Yes.

The Court: Objection overruled.
Mr. Cannon: May I cross-examine the witness upon it?
The Court: Yes.

By Mr. Cannon:

Q. Mr. Waldron, were you present at the time of this accident?
A. No, sir.
Q. Were you present when this photograph, which has been offered in evidence, was made?
A. I think I was, yes, sir.
Q. Did you make it?
A. No, sir. I had it made.
Q. Who made it?
A. I could not tell you his name; a man near us there in Suffern, New York.
Q. Do you know the position from which the picture was taken, the point where the camera rested?
A. Yes.
Q. Did you locate that point?
A. I can, yes, sir.
32 Q. Did you locate it at the time?
A. Yes.

By the Court:

Q. Was it south of the track or north of the track?
A. South of the track.

By Mr. Cannon:

Q. South of the track looking directly across the track?
A. Yes.
Q. Did you measure the distance from the rail to the place where the camera was when the picture was taken?
A. I did not.

Mr. Cannon: I object to the photograph as incompetent, irrelevant and immaterial, and the proper foundation has not been laid.
The Court: Objection overruled.
Mr. Cannon: Exception.
Received in evidence and marked Plaintiff's Exhibit No. 2.

Q. Are you a photographer?
A. No.

Q. You never made a photograph?
A. No.

By Mr. Smyth:

Q. You arrived at the scene of the accident before Mistschook's body had been taken away and before part of your wagon had been taken off the cow-catcher?
A. Yes, sir, about ten minutes after the accident.
Q. Looking down into the photograph from where the camera was, right to the back of the picture, so to speak, you are looking across first the east bound track and then the west bound track, and in a northerly direction, are you not?
A. Yes.

By the Court:

Q. That is, looking in a northerly direction?
A. Yes, sir.

33 By Mr. Smyth:

Q. And to the left-hand side of the highway before you get to the east bound track in the picture is shown an embankment. How high an embankment was that at the time of the accident?
A. I should say somewhere around ten feet high, to the best of my judgment.

By the Court:

Q. Ten feet high, above what, the level of the track, or the level of the highway?
A. Above the level of the highway, I should judge, sir.

By Mr. Smyth:

Q. Have you gone along there in a wagon?
A. Oh, yes, many times.
Q. Standing up?
A. Yes, sir.
Q. Do you know whether you can look over that embankment?
A. No, sir.
Q. You cannot?
A. No, sir.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

By the Court:

Q. How tall are you?
A. Five feet, nine.
Q. How tall was the deceased?
A. I should say about my height, and a heavier and stouter man.
Q. Did you ever travel, standing in this same wagon that was in the collision?
A. Many times.

Q. Over that road?
A. Yes.
Q. As you did so, state whether or not you were able to see over the embankment and see the track there.

Mr. Cannon: I object to that and I except.

34 The Witness: You could not see over until you got very near the track.

Mr. Cannon: I move to strike out the answer as not responsive.

Q. State how near the track?
A. I should say within ten feet of it or something like that.

The Court: Motion denied.
Mr. Cannon: Exception.

By Mr. Smyth:

Q. Within ten feet of the track?
A. Yes.
Q. That is to say the person would have to be within ten feet of the track, before you can see over the embankment?

Mr. Cannon: I object to this line of examination on the ground it is incompetent, irrelevant and immaterial, and no proper foundation having been laid. It does not appear that this man made observations, and measurements made by him from these observations, it seems to be guesswork.

By the Court:

Q. These answers of yours are based on your estimate of what you often saw?
A. Yes.

The Court: Motion denied.
Mr. Cannon: I wish to add the further ground that it calls for a conclusion.
The Court: Motion denied.
Mr. Cannon: Exception.
The Court: This last question which he objected to, do you press it?
Mr. Smyth: Yes.

(Question repeated by the stenographer as follows: "That
35 is to say the person would have to be within ten feet of the track before you can see over the embankment.")

The Court: What person?
Mr. Smyth: A person driving the wagon, standing on the wagon.

By Mr. Smyth.

Q. Do you understand that question?
A. That is what I mean.

Mr. Cannon: I renew my objection to this.
The Court: Objection overruled.
Mr. Cannon: Exception.

By Juror No. 1:

Q. Is the approach to the track an upgrade or downgrade?
A. It is a little upgrade.

By Mr. Smyth:

Q. As it was then?
A. Yes, sir.
Q. Not as it is now, but as it was in 1909?
A. A very slight grade.
Q. Is there any difference at the present time?

Mr. Cannon: I object to that as incompetent and immaterial.
The Court: Objection sustained.
Mr. Smyth: Exception.

Q. This embankment that is on the left-hand side starts from what point?
A. From the——
Q. I mean with reference to the Haverstraw Roadway, how far from the side of the roadway does the embankment start?
A. I don't just understand.
Q. Here is the embankment here, and here is the roadway?
A. Yes.
Q. How far from the roadway does the embankment start to go up?
A. Right near the road.
36 Q. Have you, in driving down to the track, to the east bound track noticed at what point you could see up the track? At what point you could see up or westerly?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and on the ground it calls for a conclusion, and a proper foundation not having been laid.
Mr. Smyth: I am now referring to 1909 when conditions were as they were at the time of the accident.

Mr. Cannon: Same objection.

The Court: Do you mean how near to the east bound track must one be in order to see west on the west bound track?
Mr. Smyth: To see west on the east bound track.
Mr. Cannon: This is too vague and indefinite.

By the Court:

Q. On those occasions, prior to the accident, when you rode in that same wagon standing up and when you were approaching, going north, the east bound track, how far or how near the east bound track, did you have to go in order to enable you to look toward the west from the east bound track?

Mr. Cannon: I make the same objection to that.
The Court: Overruled.
Mr. Cannon: Exception.
The Witness: I never depended on seeing, because you could not see far.

Mr. Cannon: I move to strike that out.
The Court: Motion granted.

37 Mr. Smyth: That is not the question his Honor asked you what you depended on.

Q. Do you remember how far or near to the east bound track you had to be before you got to a point where you could look west on that east bound track?
A. Oh, yes, sir.
Mr. Cannon: Same objection.
The Court: Overruled.
Mr. Cannon: Exception.

Q. How far?
A. I should say within say within ten or fifteen feet.

By Mr. Smyth:

Q. That is the person would have to be within ten or fifteen feet?
A. Yes, sir.
Q. That wagon that Mistschook was driving on the morning of the accident, you know which wagon it was?
A. Yes.
Q. What kind of a wagon was it, describe it?
A. It is what we call a regular mountain wagon, a wood wagon.
Q. A mountain wood wagon?
A. Yes, sir.
Q. Was that wagon longer than other wagons, or the same kind, or not, with reference to the part in front of the wagon, the part where the horses were?
A. It was longer than the ordinary wagon.
Q. A person standing in the wagon, driving the horses, how far would it be from him to the horses' heads in that mountain wood wagon?
A. I should say twelve feet or fourteen feet.
Q. Twelve to fourteen feet?
A. Yes, sir.
Q. So that the horses would be some distance ahead of the wagon?
A. Yes, sir.
Q. That is the way they were always driven?
A. On those wagons.

38 Q. The embankment is shown on the left-hand side of Exhibit 2?
A. I understand.
Q. Where was the embankment highest?
A. Nearer the railroad.
Q. Was it higher as you went away from the highway, that is, to the west, than it was as shown in the picture?
A. Oh, yes, sir.
Q. There was nothing to obstruct your view to trains coming from the opposite direction, that is, trains coming from the east, going west, was there?

A. No, sir, nothing.
Q. There, you could see quite a long distance?
A. Yes.
Q. A person standing on the other side of the track, that is, on the north side of the track, there was no obstruction on that side either, was there?
A. No, sir.

Mr. Cannon: I object to that as immaterial, and I move to strike out the answer.
The Court: I think we might take it in order to describe the entire scene generally. Objection overruled.
Mr. Cannon: Exception.

Q. Where was the station at Sloatsburg, how far from this grade crossing?
A. I should judge about three hundred feet.

Mr. Smyth: Have you a survey of that? If you have, I will take your figures for it.
Mr. Cannon: I think so.

By the Court:

Q. To the east or west?
A. East.

By Mr. Smyth:

Q. To the east of the crossing?
A. Yes.
39 Q. Was there a sign there on the northerly side of the tracks, a railroad sign as shown in the picture?
A. Yes.
Q. Was there what is called an automatic bell signal at that place?
A. Yes.
Q. Do you know what the condition of that bell was on the morning of the accident when you got there, ten minutes after the accident?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

The Witness: Out of order.

Mr. Cannon: I move to strike it out.
The Court: Motion granted.
Mr. Smyth: Question withdrawn.

Q. What was the bell doing when you got there, ten minutes after the accident that morning?
A. Ringing.
Q. How long did the bell continue to ring?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, as to what happened after the accident.

The Court: I think it is a continuing condition. Objection overruled.

Mr. Cannon: Exception.

Q. How long did the bell continue to ring?

A. I could not say how long, but several minutes, maybe five or ten minutes.

Q. Did it continue to ring while you were there?

A. Yes.

Q. All of the time you were there?

A. I think so.

Q. Did any train pass there while you were there?

A. I don't remember of any, no.

Q. Then the bell was ringing continuously all the time you were there?

A. To the best of my recollection; I know it was ringing.

Q. Did you see where Mistschook's body was when you got there?

A. Yes, sir.

Q. Where was it?

A. It was about 112 feet east of the crossing.

Q. What time of the morning was it when you got there?

A. It was somewhere, I think, about a quarter past six in the morning.

Q. You got there a quarter past six?

A. Yes.

Q. Then you may have arrived there more than ten minutes after the accident?

A. Yes.

Q. It was ten minutes before you heard of it?

A. Yes, that was the time the train was due. I don't know.

Q. Where did you live, where was your house from this place?

A. Just south of the depot.

Q. Do you recollect whether there was any sign on the bell or anything of that kind?

A. I don't know, no, sir.

Q. You did not notice that particularly?

A. No, sir.

Q. Describe what kind of a morning it was?

A. Misty, overcast morning.

Q. It was a misty, overcast morning?

A. Yes.

Q. State whether or not in that valley there is always a morning mist before the sun is up?

A. Yes, sir, always.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and I move to strike out the answer.

The Court: Objection sustained.

Mr. Cannon: I move to strike out the answer.

The Court: Motion granted.

Mr. Smyth: Exception.

41 The Court: It may be a manner of proving it, but I suppose your purpose is to bring notice to the defendant as to the conditions there.

Mr. Smyth: Yes, not only that, but if there is always a mist there, then that is some corroboration of the testimony in the case that it was misty that morning.

The Court: You have his definite testimony that it was misty that morning.

Q. When you started out from your house ten minutes before you arrived there, did you use a light or light any light, and if so, where and when?

A. I lit it in the house.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

Objection overruled.

Mr. Cannon: Exception.

Q. Go ahead?

A. When I got outdoors, I left it. I could see without it.

Q. You could see without it after you got out of doors?

A. Yes.

Q. That, you say, was after six o'clock?

A. Somewhere about there, about six o'clock.

Q. At the time you got down there to the scene of the accident which you say was quarter after six, did you see the train which had struck the wagon?

A. Yes, sir, I did.

Q. What position was it in then, where was the rear platform of the rear car of the train?

A. Somewhere near the station.

Q. To the west of the edge of the station or to the east of the edge of the station?

A. To the west.

Q. How many cars were there on the train?

A. I could not tell you how many. It was a long train.

42 Q. Do you know the train?

A. I have quite often seen it, yes, sir.

Mr. Smyth: It will be conceded, I think, that it was the Buffalo Express, No. 8?

Mr. Cannon: No. 48.

Mr. Smyth: No. 48, a through express from Buffalo, is that right?

Mr. Cannon: It came from Hornell, I think. We will find out for you in a minute.

Mr. Smyth: Also how many cars there were, and I will take your statement for that.

Q. Did you see any part of your wagon on the engine?

A. Yes, sir, the front part of my wagon was on the cowcatcher of the engine.

Q. Was the front wheel on the engine?

A. Yes, sir, the two front wheels.
Q. Both front wheels?
A. Yes, sir, the front part of the wagon.
Q. Did you see marks on the ground, and if so, what marks did you see at the crossing?
A. I saw where the engine had struck the front wheel of the wagon and slid it about a rod before it picked it up off the ground.
Q. There were two horses, were there not?
A. Yes.
Q. What happened to the horses?
A. It killed one outright and crippled the other one, broke his legs and jaw, so he had to be shot.
Q. Had you noticed Mistschook's habit of driving and what kind of a driver he was?
A. Yes.

Mr. Cannon: I object to that unless it appears what opportunity he had.
Mr. Smyth: I will bring that out.

Q. Had you noticed?
A. Yes.
43 Q. In what way, what opportunities had you had of seeing him driving the horses?
A. I was pretty nearly aways with him in the daytime.
Q. In the daytime you were pretty nearly always with him?
A. Yes.
Q. What kind of horses were these that he was driving that morning?
A. They were big work horses.
Q. What were their habits?

Mr. Cannon: I object to that.

The Witness: Kind and trusty.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and as too remote.
The Court: I will allow that.
Mr. Cannon: Exception.

Q. Do you recollect where that engine was as it was stopped when you got there with the wheels of your wagon still on it?
A. It was east of the depot.
Q. Do you know how far east of the depot?
A. I should think 200 feet or more.
Q. East of the depot?
A. Yes.
Q. What load, if any, was there on the truck when Mistschook started out?
A. Nothing.
Q. He was going for a load?
A. Yes.

Q. Where was the after part of the wagon when you got to the scene of the accident, the hind wheels and the body?
A. Right near the crossing.
Q. Were they cut off?
A. Yes.
Q. At what point?
A. At the middle.

Mr. Smyth: The west end of the station is 812 feet from the middle of the Haverstraw road, is that right?
Mr. Cannon: Yes.
44 Mr. Smyth: That is conceded?
Mr. Cannon: Yes.

Q. Had you had any conversation just before or shortly before this accident occurred with Mistschook with regard to his intentions with respect to bringing his family to America?

Mr. Cannon: I object.

The Witness: Yes, sir.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and I move to strike out the answer.
The Court: Strike out the answer.
Mr. Smyth: We will withdraw this witness and put in the translation of the letter.

FRANK CONNES, called as a witness in behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. Smyth:

Q. Are you a Russian interpreter?
A. I am a general interpreter, interpreting in seven languages.
Q. Are you employed in any official capacity?
A. I am official interpreter of the City Court of the City of New York.
Q. At our request, have you translated the letter designated as Exhibit No. 1, in the deposition of Irene Greetzug?
A. I have translated a letter which was submitted to me for translation by you.

Mr. Smyth: It is conceded that that is the letter which I took from the original deposition?
Mr. Cannon: Yes.
45 Mr. Smyth: I offer in evidence the letter and I ask that the translation be read.
Mr. Cannon: I object to the introduction of the letter as incompetent, irrelevant and immaterial.
Mr. Smyth: If you mean by that to raise a question of the handwriting and about its being written by the deceased, your objection may be good. Is that the ground of your objection?
Mr. Cannon: That is one objection; I don't know by whom it was written.

The Court: How can you object to the contents of the letter if you don't know it; if you connect it, I will receive it.

Mr. Smyth: The twentieth interrogatory is as follows:

"Twentieth Interrogatory: Did your husband say anything to you about a house he was trying to get in the United States to make a home there, or did he every say to you that he intended to make his home in the United States? If the answer is that he did so state, please give the substance of what he said to you, and if he so stated in writing, please annex the writing to your deposition or a copy of it, but if you can not find a writing after you have made a diligent search for it, please state that fact."

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

The Court: Is the question pressed?

Mr. Smyth: The question is pressed with regard to receiving a letter, not giving the contents of the letter.

46 The Court: Referring to a letter annexed and marked as an exhibit?

Mr. Smyth: Yes, that shows in the answer.

The Court: That part of the answer may be received.

Mr. Cannon: Exception.

Mr. Smyth (reading): "Answer to Twentieth Interrogatory: He wrote to me."

The letter was produced and identified after having been read to deponent (that is to the witness), being Exhibit No. 1 of the deposition, and I therefore offer Exhibit No. 1.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Cannon: Exception.

Mr. Smyth: This is the original letter.

Received in evidence and marked Plaintiff's Exhibit No. 3.

Q. Is this a correct translation of that letter that you have handed me?

A. Correct, to the best of my ability.

Q. Is it correct?

A. It is correct, yes.

Mr. Smyth: Will your Honor permit me to read the translation into the record.

The Court: Either you or the witness may read it.

Mr. Cannon: I object to the translation being read or introduced into evidence on the grounds stated in the objection to the offer of the original letter in evidence, as incompetent, irrelevant and immaterial.

The Court: It seems to me now as being connected with a letter from the deceased, that the objection should be overruled.

Mr. Cannon: Exception.

47 Mr. Smyth: I have just read this translation and this seems to be some other letter, and not the letter we wanted. It is dated 1907. We wanted a letter written not long before his death.

This was written when he first went to Sloatsburg. I withdraw the offer unless my friend wants it to go in.

BENTON WALDRON, a witness in behalf of the plaintiff, previously sworn, resuming, testifies as follows:

Direct examination resumed by Mr. Smyth:

Q. I was asking you, Mr. Waldron, just before you left the stand, whether you had any conversation shortly before the death of Mistschook in regard to his family and what he intended to do?
A. Yes, sir.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and indefinite and uncertain.
The Court: What is the purpose of the question?
Mr. Smyth: To show that he was not only supporting his relatives abroad but that he was making arrangements with this man to rent a house from him, and had rented a house the week before for the purpose of supporting them here with him.
The Court: Objection overruled.
Mr. Cannon: Exception.

Q. What was that conversation?

Mr. Cannon: I make the same objection to this question.
48 The Court: That goes without saying.
Mr. Cannon: Exception.

A. He intended to send money to his wife.

Mr. Cannon: Is this a conversation you are getting?

Q. What did he say to you?

Mr. Cannon: I move to strike out what he just stated as not responsive.
The Court: Motion granted.
Mr. Smyth: I consent.

Q. What did he say to you; you got some idea what he intended to do, but what did he say to you?
A. He wanted to bring his family over.

Mr. Cannon: I move to strike that out as not responsive.

By the Court:

Q. Did he say that?
A. Yes.

The Court: Motion denied.
Mr. Smyth: Go on.

Q. What else did he say?
A. He wanted to rent a little house from me, one of my little houses.
Q. That is what he said?
A. Yes, sir.

By Mr. Smyth:

Q. Go ahead and state what he said?
A. The Saturday after his death he wanted to send the money.
Q. You mean before his death?
A. Before his death. He wanted to send the money to his family.

Mr. Cannon: Is that what he said to you?
Mr. Smyth: Yes.

49 By the Court:

Q. Is this all that he said to you?
A. Yes.
Q. Go on?
A. He wanted to send money to bring his family over to live in my house.

By Mr. Smyth:

Q. What did you say to him?

Mr. Cannon: I object to all this testimony as incompetent, irrelevant and immaterial.
The Court: Objection overruled.
Mr. Cannon: Exception.

A. I let him have the house. I told him he could have the house.
Q. What house did you say he could have?
A. One of my little houses right near my place.
Q. What was the style of the house that you said to him he could have?
A. Part concrete and part wood.
Q. Did you agree on a rental?
A. Yes.
Q. What was the rental you agreed upon?

Mr. Cannon: I object to that as immaterial and irrelevant.
The Court: Objection overruled.
Mr. Cannon: Exception.

A. $3 a month I was going to charge him.
Q. $3 a month?
A. Yes.
Q. How large a house was it you rented to him for this sum?

Mr. Cannon: May we have the same objection to all this line of testimony?
The Court: Yes, to this entire conversation.
Mr. Cannon: And exception.

50 By the Court:

Q. How large was this house that you agreed to rent to him?
A. 14 by 24, or something of that kind.

By Mr. Smyth:

Q. One story?

A. Two-story, or a story and a half.
Q. How many rooms were there in it?
A. Three rooms. I had just built this place and he wanted it. There would have been three rooms when it was finished.
Q. It was not quite finished?
A. That is right.
Q. But you promised it to him?
A. Yes.
Q. And agreed with him as to the amount he should pay?
A. Yes.
Q. This was how many days before he was killed?
A. A very few days. On the following Saturday he was going to send the money for his family.
Q. Do you know whether or not he had saved up any money for this?
A. Yes.

Mr. Cannon: I object to that and move to strike out the answer as incompetent, irrelevant and immaterial.
Mr. Smyth: If he knows that he saved it.
Mr. Cannon: I think he has testified far enough on the intention of this deceased.

By the Court:

Q. How did you come to know it?
A. How did I come to know this man?
Q. About saving money, how did you come to know that?
A. He always told me. Sometimes I kept it for him two weeks.

The Court: Objection overruled.
Mr. Cannon: Exception.

51 (Question repeated by the stenographer as follows):
"Q. Do you know whether he had saved up any money for this?
A. Yes, sir, he told me he had.

By Mr. Smyth:

Q. He only told you he had?
A. Yes.
Q. This was not money you kept for him?
A. I only had a little money of his, $20 that I gave to him on the Saturday before he was killed.
Q. The other money spoken about was merely money he had told you about?
A. Yes, he had it and carried it and told me he had it.

Cross-examination by Mr. Cannon:

Q. This photograph, Plaintiff's Exhibit 2, which you have identified, was made while you were present, wasn't it, or do you know?
A. It was taken while I was there, yes.
Q. You don't know whether this is the photograph or not, I suppose?

A. I think it is, yes, sir.

Q. I understand that you did not make any measurement at the time this photograph was prepared, did you?

A. I don't think I did at the time this was taken.

Q. That is what I am referring to. You did not make any measurements of the distance that the camera was from the east bound track when this picture was taken, Plaintiff's Exhibit No. 2?

A. At the time that was taken, I don't think so.

Q. What is your best recollection, did you make any measurement or didn't you, of the distance of the camera from the railroad track?

A. I think I did at one time, yes, sir.

Q. Did you when the photograph was taken?

A. I don't remember.

52 Q. Did you put the writing on the back of this photo, "approach to crossing, 72 feet"?

A. No, sir.

Q. Is that about what that represents, a view of the crossing about seventy-two feet from the track?

A. I don't understand your question.

Q. Was it a Mr. Anderson who prepared this photograph for you of Suffern?

A. That may be his name. I don't know his name. He was from Suffern, yes, sir.

Q. After the man was there and took his view was this sent to you, this photograph?

A. Yes, sir.

Q. By the mail?

A. I don't remember whether he gave it to me or whether he sent it by mail.

Q. You cannot state now, can you, where the camera was when the picture was made?

A. Somewhere in that road.

Q. Somewhere in the highway, is that right?

A. Yes.

Q. Can you state how far it was from the track?

A. No sir, I cannot.

Mr. Cannon: I move to strike out this exhibit on the evidence just given by the plaintiff, this photograph which has been marked Plaintiff's Exhibit No. 2.

The Court: Motion denied. He has testified it is a fair representation of the scene of accident, at the time of the accident.

Mr. Cannon: Exception.

Mr. Smyth: If your Honor please, as the translation was not read of the letter which was marked in evidence, I suppose in order to make the record complete the letter itself should be stricken from the record.

The Court: Yes.

Mr. Smyth: I move to strike out Plaintiff's Exhibit No. 3.

The Court: Motion granted.

53 Q. Now, Plaintiff's Exhibit No. 2, Mr. Waldron, I understand you to say this is a general view of the crossing?
A. Yes.
Q. Looking towards the north? Is that right?
A. Yes.
Q. It shows the highway on the opposite side of the track from that in which the deceased approached the track, that is right is it not?
A. Shows what?
Q. Shows a view across the track on the north side of the track?
A. Yes.
Q. And apparently the view is directly across the track, is it not?
A. Yes.
Q. This highway shown on the foreground of the picture as it comes along towards the crossing, it runs in what general direction?
A. North, I should say.
Q. You are assuming that the tracks run in what direction?
A. East and west.
Q. Practically east and west?
A. East and west, yes, sir.
Q. Before you get here to this point shown in the foreground, does not the highway come in a diagonal direction approaching the track?
A. Yes.
Q. The highway runs more or less parallel with the railroad track, does it not, as it comes up here?
A. It cuts some angle across the track.
Q. As you come along the highway and start to cross the track you are facing the northeast, are you not, before you get to the turn in the road?
A. What turn do you refer to?
Q. Doesn't this road come up here, and then gradually turn across the track?
A. I don't think there is any turn in it. It goes diagonally across the track.
Q. Then this is in a diagonal direction across the track?
A. Yes.
Q. As you are approaching the track that direction is north east, is it not?
A. Yes.
54 Q. North west, I mean, isn't it?
A. North east, I would call it.
Q. You assume that the tracks run east and west, do you not?
A. Yes.
Q. And that this crossing comes over the track from the south to the north?
A. Yes.
Q. In a diagonal direction, is that right?
A. Yes.
Q. As you are coming from the south to this crossing and ap-

proaching the tracks you are facing the north and the west, are you not?

A. You would so call it, I suppose.

Q. That is the fact, isn't it?

A. I would call it north east.

Q. The tracks there run practically north and south, do they not?

A. Yes, we call it east and west.

Q. The railroad men call it east and west?

A. Yes.

Q. The tracks right at this point practically run north and south?

A. Yes, I should think so.

Q. When you are coming from the direction which Mr Mistschook took in crossing the tracks and going over toward these houses shown in the picture, in which direction are you going?

A. North east, I should say.

Q. The train which struck the man came from the north, did it not, the north, or as we call it, the west?

A. On the east bound track.

Q. You have testified on your direct-examination that you had noticed crossing this track, you had to be about ten or fifteen feet from the east bound track to see the track, is that right; up toward the north or west?

A. To see any distance up the track, yes.

Q. Did you ever go there and make observations and then take measurements of the extent of view from various points on the highway?

A. I think I did at one time.

Q. Was that before or after the accident?

A. After.

55 Q. Are you testifying from those observations?

A. No.

Q. You are not?

A. I have no recollection of them, no.

Q. Your estimate is that when you are ten or fifteen feet from the track you can see up the track?

A. You can see a distance up the track, yes, a little distance.

Q. You stated the station was about three hundred feet from the crossing, is that right?

A. East or south.

Q. East?

A. I am only guessing at it.

Q. Are you guessing about the other figures when you say you have to be about ten or fifteen feet before you can see up the track?

A. I have crossed it a great many times, and I am pretty well acquainted with the crossing.

Q. You are acquainted with the distance from the crossing to the station, are you not?

A. Never measured it.

Q. Never measured this ten or fifteen feet you spoke of?

A. I guessed at it, but I am not far out of the way.

Q. You live near the station, don't you?

A. Quite near, yes.

Q. This very morning you came up from the station to the crossing?

A. Not from the station, from my home.

Q. From near the station to the crossing?

A. Yes.

Q. Your estimate of that distance is three hundred feet, is that right?

A. Well, it is a little further.

Q. From the station?

A. Yes, I should say so, yes.

Q. Your estimate as to the distance from the crossing to the station is about as accurate as your estimate of the distance of the view at the crossing, is that right?

A. No, I would not say so.

56 Q. Is it better in one case, than the other?

A. I think I could judge ten feet better than I could judge five hundred feet or three hundred feet.

Q. It was daylight at the time of this accident, wasn't it?

A. Between dark and daylight, yes.

Mr. Smyth: At the time of this accident he was not there. He arrived there at a quarter after six.

Q. You left your house around six o'clock?

A. Yes.

Q. You had no occasion for a lantern at that time outdoors?

A. I could see without it. It was not light yet.

Q. Of course it was not noon-day?

A. No.

Q. Am I correct in my recollection of your testimony that after you arrived at the crossing you think the crossing bell was ringing?

A. Well, it was ringing after I was there a few minutes.

Q. Then did it stop ringing, after you were there?

A. I don't remember that.

Q. You remember it ringing after you got there, is that it?

A. I remember it ringing when my horse stood there, crippled, and I ran over there by him and held him. I thought the train would go by, and I did not want it to frighten my horse, and I held him.

Q. What train are you talking about?

A. I supposed there was a train coming when I heard the bell ringing.

Q. You stood there five or ten minutes?

A. I should say so, yes.

Q. You don't know whether it was ringing when you left there or not, do you?

A. I do not. I was somewhat excited at the time.

Q. I also understood you to say, you did not remember whether a train passed while you were there?

A. I don't know, no, sir.

57 Q. After the accident you say you observed the express train down near the station?

A. Yes, sir.

Q. I suppose you saw the rear end of the train, didn't you?

A. Yes.

Q. That was near the station, was it not?

A. Quite near it, yes, sir.

Q. This wagon which the deceased was driving was very large wagon, wasn't it?

A. An ordinary weight wagon, the ordinary weight for our use, a mountain wagon.

Q. It was used for what purpose?

A. Hauling wood and lumber.

Q. And had heavy wheels?

A. Ordinary heavy.

Q. Sort of a lumber wagon?

A. Yes.

Q. Then what did the body consist of?

A. A wood rack, we call it.

Q. That is, it consisted of a platform and stakes around the side, is that the idea?

A. Yes, sir.

Q. Did it have a dashboard or something up in front?

A. Yes.

Q. How high was that?

A. Between four and five feet, I should say.

Q. Rather high dashboard?

A. Yes.

Q. Was the rack one of these affairs that you build yourself or had a local man?

A. Oh, yes, our men build them.

Q. These stakes rest in holes in the frame, do they not?

A. Yes.

Q. I suppose they are not very firm there, I suppose they shake, don't they?

A. The stakes are not very firm, no, sir. You can pull them out.

Q. That is the reason for the stakes being that way, so you can pull them out and do other things?

A. Yes.

Q. Is there a rail around the stake?

A. No.

Q. The floor of the wagon was what?

A. Slats, and boards in the bottom.

58 Q. Loose boards?

A. Yes, if there were any, they were loose. We never have any bottom in these kind of wagons.

Q. In other words, it is the old-fashioned wood wagon with loose boards making up the floor, resting upon the axles?

A. Resting upon the slats of the rack.

Q. The only firm things about it are the frame and the dash-

board, the rest was all loose, the floor and the side sticks, is that right?

A. The rack is pretty firmly built.

Q. I suppose firmly built enough to hold a load, but the stakes, I understand, were loose in the pockets or the holes of the frame?

A. Yes.

Q. The floor of the wagon is constituted on loose planks?

—. ——.

Q. Never have very much of a floor in those kind of wagons?

A. Sometimes just a board to stand on.

Q. I don't care why you do it or anything of that sort. I understand there is an upgrade as you come from the south over these tracks the direction which Mistschook took. There is a rise in the roadway, isn't there?

A. A very slight one.

Q. There is an appreciable rise, isn't there?

A. Very little.

Q. Is there an appreciable rise, one which you can see?

A. You can notice it but that is about all.

Q. That is what I asked you?

A. You mean at the crossing?

Q. As you approach the crossing, near the crossing?

A. There is not very much of a rise as you approach the crossing, but after you get across there is a little rise across the track.

Q. Isn't there before you get to the track?

A. Not after you are in this little cut, as I call it, this little cut that runs to the track on the Orange Turnpike.

59 Q. My questions were not put as to the present time. I want to know, if at the time of the accident there was an upgrade in the highway before you got to the tracks?

A. Well, a little.

Q. Of course I am only talking about what happened at the time of the accident or the positions at the time of the accident, or thereabouts, you understand that, do you not?

A. Yes.

Q. Did you see the engine of the express train standing down by the station?

A. I did not see it when I got there, no, sir.

Q. You saw it afterwards?

A. Afterwards.

Q. And the engine was beyond the station building?

A. Yes, sir.

Q. About how high was the floor of the wagon which the deceased was riding in? How high above the level of the road?

A. I could not tell you just how high it was. I should say around two feet. It may have been two and one half feet.

Q. As high as that railing (indicating)?

A. I don't think so, no, sir.

Q. Was it as high as the end part of that railing (indicating)?

A. It may have been, yes, sir.

Q. You say that is where the floor of the wagon was?

A. Yes, sir.

Mr. Cannon: About how many feet do you concede that to be?
Mr. Smyth: The officer is measuring it.
(The distance was thereupon measured by a tape measure and found to be 31½ inches.)

The Witness: I can give you probably a better idea of the height. The height of the wheels of that wagon which we drive is about three feet six or eight inches high. If you could estimate at the centre, that may be it, when a wagon has the racks on.

Q. How long was the tongue of this wagon?

A. Ten feet long. It might have been a little longer.

60 Q. It may have been a little shorter than ten feet?

A. No, we never make them shorter. We make them longer for bigger horses.

Q. The photograph which has been introduced in evidence, Plaintiff's Exhibit No. 2, on the back is written "approach from crossing 72 feet." Did I ask you whether you wrote that on there?

A. No, sir, I did not.

Q. Do you know who did?

A. I do not.

Q. Do you know when the picture was taken, what date, or about what time?

A. I don't know the date, no, sir. Sometime after the accident.

Q. This road where the accident happened is the Haverstraw Road?

A. The Haverstraw Road, near the Orange Turnpike. The Orange Turnpike is going over this hill, away over here (indicating the left-hand side of the picture).

Q. It runs on top of the embankment, is that it?

A. Yes.

Q. Did you say about what time that was taken?

A. The morning of the accident.

Q. The time that picture was taken?

A. Some time after the accident, I don't remember the date.

Q. Can you say whether it was too months or six months or a year?

A. It could not have been as long as that.

Q. As long as what?

A. Six months.

Q. This road shown in the picture which I understand is the Haverstraw Road, where the accident happened, is a dirt road, is it not?

A. Yes.

Q. It is not a macadam road?

A. Just an ordinary country dirt road. A dirt road, a gravel road. That is all it is, a country road.

By Mr. Smyth:

Q. A gravel road?

A. A dirt road.

61 By Mr. Cannon:

Q. And in the spring it is pretty rough?
A. Ordinary.
Q. The same as country roads are, dirt roads?
A. As good as the ordinary dirt road.

Redirect examination by Mr. Smyth:

Q. Can you state what amount of traffic goes over the road at about that time?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.
The Court: Objection overruled.
Mr. Cannon: Exception.

A. Sometimes there is quite a good deal of travel there. The school children all have to cross this track.

Mr. Cannon: I object to that and move to strike out the answer as incompetent and immaterial.
The Court: Strike it out.

Q. All I want to get is, was it the main highway between Sloatsburg and Haverstraw?
A. Yes, sir, on that road.
Q. What I cannot quite understand is this road, that you say shows up in the corner of the picture. Is that on the top of the embankment?
A. It is.
Q. Does that cross the track on a bridge or how?
A. No, it keeps on the west side of the Erie all the way up.

The Court: I recollect plaintiff's counsel stating in his opening that he had an eye-witness. I am somewhat in doubt as to the admissibility of some of this witness's evidence regarding al-
62 leged careful habits of the deceased, so with regard to that ruling which I made I think it will have to stand. That is, I sustain the objection to the question as to how this deceased drove, when the witness was with him.

By Juror Number Seven:

Q. How were you notified of the accident?
A. My neighbor notified me.
Q. One of the neighbors in the vicinity of the accident?
A. Yes, sir.
Q. He came up to your house and got you out?
A. Yes, he lived right next to me.

By Mr. Smyth:

Q. Who was he?
A. My cousin.
Q. What is his name?
A. Warren Waldron, the undertaker. It happened to be he was the first man who saw my wagon on the engine.

Q. Then he notified you?
A. Yes, sir, right away.
Q. The undertaker did not see the accident though?
A. Afterwards, yes.

By Mr. Cannon:

Q. He went up there like you did?
A. Yes.

By Mr. Smyth:

Q. He did not see the accident?
A. No, sir.

By the Court:

Q. Did you find any person there when you arrived at the scene of the accident, any living person?
A. Yes, there was several there, yes, sir.
Q. Several?
A. Yes, sir.
Q. Were railroad employees there among them?
A. I think there were some of them.
63 Q. How many were there, a crowd? Do you say?
A. In a very few minutes there was.
Q. I am speaking now of the time when you first got there?
A. There were, I should say, a dozen and a half or a dozen people.
Q. Were there any among those wore uniforms of the railroad employees?
A. I don't remember.
Q. You could not say that?
A. No, sir.
Q. Did information come to you at that time that among those persons present were some eyewitnesses to the accident?
A. No, sir, I don't think so.
Q. No information came to you to that effect?
A. No, sir.

WILLIAM M. FINCH, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Smyth:

Q. What is your occupation?
A. Carpenter by occupation.
Q. Where do you live?
A. Sloatsburg.
Q. You are a carpenter in the village there?
A. In and about the village.
Q. How long have you lived there?
A. Between forty-five and forty-seven years.
Q. Were you there before the Erie Railroad came there?
A. No, sir.

Q. Are you familiar with that Haverstraw Road crossing as shown in Plaintiff's Exhibit No. 2?

A. Yes, I am quite familiar with that crossing.

Q. Before the accident had you passed there frequently?

A. Several times, yes, sir.

64 Q. Both afoot and in wagon?

A. Yes, [illegible], and went to school over that crossing.

Q. You have stood up in wagons going by there?

A. Yes, sir.

Q. You know the wagon that this man Mistschook was driving at the time he was killed?

A. I don't know the wagon, but I am familiar with that kind of wagon, what they call wood wagon.

Q. A wagon called a mountain wood wagon?

A. Yes.

Q. Is that a different style of wagon, so far as the distance the horses' heads are away from the driver than other wagons?

A. No, it is for heavy work.

Q. Do you recollect the embankment that was on the left-hand side of the person approaching the east bound rail as shown in that photograph (indicating)?

A. Yes.

Q. Just describe that embankment and how high it was and whether or not it obstructed the view of the person coming to the track?

Mr. Cannon: I object to that as calling for a conclusion, and as incompetent, irrelevant and immaterial.

Q. Take the first part of the question first. Describe that embankment?

The Court: Then the question objected to is withdrawn?

Mr. Smyth: Yes.

The Witness: The embankment started from the edge of the road to rise and continued to rise and went over the brow of the hill, as we call it, and the very highest point was twenty or twenty-five feet above the rails. That is a distance off from the crossing, and then commence to descend again.

65 Q. How close to the railroad track did the embankment come as shown in the picture there, Exhibit 2?

A. From the rail back to the edge of the bank where it started to raise must be seven or eight feet—six or seven feet, I would judge.

Q. Six or seven feet?

A. From the edge of the rail, yes, all the way along through that cut.

Q. Does the railroad run in a cut there?

A. It is a cut, yes, sir.

Q. The highway as it was at that time, not now, but as it was then, do you know how close you had to come or did come to the first rail before you could look up the track?

Mr. Cannon: I object to that as incompetent, irrelevant and im-

material, and it does not appear that the witness has made observation for the purpose of testifying and the answer calls for a conclusion.

The Court: It is the same question on which I ruled before, is it not?

Mr. Cannon: Yes, practically the same question.

The Court: This witness was born and raised in that locality.

Mr. Smyth: Yes, sir, and went to school there.

The Witness: I was not born there, but I went to school there.

By the Court:

Q. You were raised there?

A. Yes.

Q. And had occasion to pass the scene of this accident frequently just before the accident?

A. Not frequently just before the accident but I did live on that side of the track at one time, and I had to cross it regularly every day.

66 Q. How long before the accident was that?

A. That was fourteen years before the accident.

Q. Was the situation just the same during those years?

A. Yes, sir, just the same.

Q. The hill there?

A. Yes, sir, just the same. It used to be years ago a little worse, but since that they have run the state road up from this hill and that had a tendency to cut it down again. Instead of going out across the railroad and back over it again, they have run the road up on this side of it. This is a state road now. They used to have to go around here and cut down and across the track again and then strike the state road again.

The Court: Objection overruled.

Mr. Cannon: Exception.

(Question repeated by the stenographer as follows):

"Q. The highway as it was at that time, not now, but as it was then, do you know how close you had to come or did come to the first rail before you could look up the track?"

The Court: That is to the southernmost rail?

Mr. Smyth: On the first rail of the east bound track approaching it, as shown in the picture.

The Witness: You would have to get within ten or twelve feet, before you would get a direct line so you could see up the track without any interference whatever.

By the Court:

Q. Up the track west?

A. West, yes, sir.

67 By Mr. Smyth:

Q. Do you remember the morning of the accident?

A. Yes, sir.
Q. You did not see the accident?
A. No, sir.
Q. When you arrived there, what was the situation?

Mr. Cannon: Did he arrive there?

Q. You arrived there, didn't you?
A. Yes.
Q. What time was it when you arrived there?
A. Shortly after seven o'clock.
Q. It was after seven o'clock?
A. After seven, yes, sir.
Q. Was Mistschook's body still there?
A. Yes, sir.
Q. Undertaker Waldron had not got it yet?
A. There was a body lying below the track, I did not go by it. They said it was the man.
Q. Aren't you mistaken as to the time, wasn't it nearer six o'clock in the morning?
A. No, it was a little after seven I got there.
Q. Did you notice this bell on the crossing at the time?
A. I heard the bell ringing.

Mr. Cannon: I object to that and move to strike out the answer as incompetent, irrelevant and immaterial.
Mr. Smyth: I am going to show that it was ringing continuously.
The Court: Objection overruled.
Mr. Cannon: Exception.
Mr. Cannon: I move to strike out the answer.
The Court: Motion to strike out denied.
Mr. Cannon: Exception.
The Court: On the ground it is offered to show a continuing condition.
68 Mr. Cannon: It establishes nothing.
The Court: You may bring out whether or not the witness saw or heard any train in that locality.

Q. Where do you live, or where did you live at that time?
A. I live west of this accident, three hundred feet, possibly, back from the railroad track, and maybe a thousand feet above the accident, right on the main road.
Q. When did you first hear this bell ringing?
A. As I approached down to the crossing.
Q. Was there any train passing at that time?
A. I saw no trains, no, sir.
Q. For how long a time did you hear this bell ringing?
A. During the time I was there.
Q. How long was that?
A. Not over twenty minutes.
Q. Was it ringing continuously?
A. Yes.

Mr. Cannon: I renew my objection to all this line of testimony, as to what happened after this accident, as incompetent, irrelevant and immaterial.

The Court: Same ruling.

Mr. Cannon: Exception. May I have the same objection to all this testimony?

The Court: No, only to that part of it which goes to show a continuing condition.

Mr. Cannon: That is what I refer to, the continuous condition of the ringing.

The Court: That you may have, yes.

Mr. Cannon: And an exception?

The Court: Yes.

Q. During this time you say the bell rang continuously while you were there, for twenty minutes, and you saw no train going by?

A. No, sir.

69 Q. Do you recollect whether there was any sign on the bell?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Cannon: Exception.

A. There was a sign board hung under the bell.

The Court: Do you expect to connect this back?

Mr. Smyth: I am going to see if I can. I was not going to ask what was on the sign until I could find out.

Q. When did you first see that sign there?

Mr. Cannon: Same objection to that.

The Witness: Noticed it there that morning.

The Court: Objection overruled.

Mr. Cannon: Exception.

Q. Was that the first you ever saw of the sign?

A. That was the first I ever saw it to notice it, yes, sir.

By the Court:

Q. You say you never observed this sign board—was it a board?

A. Yes.

Q. Before the morning of this accident?

A. No, sir, I never paid any particular attention to it. I happened to notice it this morning.

Q. You may describe this sign board in all particulars, leaving out only what was said on it, if anything?

A. A little board about twenty-four inches long, I should judge, and between seven and eight inches wide.

Q. What was it attached to?

A. It hung on the signal post under the bell.
70 Q. It hung there?
A. I won't say whether it was hanging or whether there was a nail driven.
Q. Do you know how it was attached?
A. I could not say whether it was hung or a nail driven through it.

Mr. Cannon: May we have an exception to this line of examination?
The Court: Yes.

Q. Was there lettering on this board?
A. Yes, sir.
Q. Without stating what the lettering was, tell us how the lettering was made?
A. Black letters, white background and plain letters.
Q. White background with black letters?
A. Yes, a white background with black letters.
Q. Were the letters made roughly by hand or were they regular, would you say?
A. They were regular.
Q. Did you see any railroad employees around there at that time when you were there?
A. I believe I saw the track foreman.

The Court: Under those circumstances I do not think we should take what was on the board, if anything was on the board.
Mr. Smyth: I say if they make that objection, I won't press it.
The Court: All the evidence about this board is stricken out.
Mr. Cannon: Will your Honor please ask the jury to disregard it.
The Court: The jury will disregard the testimony about this board.
Mr. Smyth: But not about the bell?
The Court: But not about the bell, but you see whatever the board might have been, as there was an employee of the railroad
71 there, it might have been placed there after the accident by this employee. It is all stricken out and the jurors are instructed to disregard it.

NEW YORK, January 9, 1914.

Trial resumed.
Appearances: Same as before:

WILLIAM M. FINCH, a witness in behalf of the plaintiff, resuming, testifies as follows:

Direct examination resumed by Mr. Smyth:

Q. We were talking about the bell last night. At other times before the accident happened, what, if anything, had you noticed about that bell ringing when there were no trains?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and too remote and not binding.
Mr. Smyth: It shows notice to the defendant railroad.

The Court: I am inclined to allow the question if it is limited as to the time.
Mr. Smyth: Question withdrawn.

Q. When, before the day of the accident, at night or any other time, had you noticed the bell ringing?
A. In the daytime.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.
Objection overruled.
Mr. Cannon: Exception.

72 By the Court:

Q. When, before the accident?
A. I can't specify the date.

Mr. Cannon: Same objection.
The Court: He can't specify the date; strike it all out.

By Mr. Smyth:

Q. Without specifying the date, what is your best recollection as to how long before the accident the bell had rung continuously that way, when no trains were in sight?

Mr. Cannon: Same objection.

By the Court:

Q. Can you say how many days before?
A. No, sir.

The Court: Strike it out.
Mr. Smyth: Of course, he cannot say how many days, but I asked him what was the best of his recollection.

By Mr. Smyth:

Q. What is the best of your recollection as to that?

Mr. Cannon: Same objection.
The Court: Same ruling.
Mr. Cannon: Exception.

The Witness: The same winter of the accident.

The Court: Strike it out.
Mr. Smyth: That is too remote.
The Court: He says the same winter.
The Cannon: The accident happened in March.
73 The Court: I don't think that has any probative force at all.
Mr. Smyth: If I cannot get anywhere near it, then we can strike it out, but I think I can.
The Court: It is stricken out already, but if you want to try again, you may.

By Mr. Smyth:

Q. Instead of saying the same winter, give us, if you can, from your recollection, about how close, whether it was a week or a month or two weeks or a day?

A. I could not say positively as to the weeks or months.

Q. Not positively, but your best recollection.

A. Just during that winter.

By the Court:

Q. Have you really any recollection about it?

A. Not as to time, no, sir.

Q. Not as to time?

A. No, sir.

By Mr. Smyth:

Q. Do you recollect the night preceding the morning of the accident, within twelve hours, that same night, do you recollect hearing that bell?

A. I can't say.

Q. You can't say?

A. No.

Q. Where did you say you lived, 1,000 feet one way and 300 another?

A. About that; yes, sir.

By the Court:

Q. From the scene of the accident?

A. Yes, sir; from the scene of the accident.

74 Cross-examination by Mr. Cannon:

Q. Mr. Finch, in describing the embankment alongside the railroad track, you stated in your direct-examination that it began at the edge of the road. By that you mean the highway?

A. That was the first, from the edge of the road, the bank started.

Q. And slopes?

A. Yes, sir.

Q. Up—you said the highest point was twenty or twenty-five feet above the rails? Did you ever make that measurement?

A. Not measuring it; no, sir. Approximately, I took that.

Q. That point is where on that embankment or was where at that time—all my questions will be directed to the time of this accident.

A. Approximately between three and four hundred feet west of this crossing.

Q. Three or four hundred feet to the west?

A. Yes.

Q. The height of the embankment right near the road, the highest point on it is not more than ten feet, is it—I believe Mr. Waldron said about ten or twelve feet; is that right?

A. The highest point is near the crossing and begins to slope up.

Q. When you get to the top, what is it?

A. The highest point is what I speak of.

Q. When you get to the highest point right near the road crossing?

A. Possibly about ten feet.

Q. This twenty or twenty-five feet that you spoke of as being the highest point is about 300 feet west?

A. I would judge that.

Q. Beyond that point, the embankment begins to descend again toward the west, is that right?

A. Yes, sir.

Q. This highway crosses the track diagonally, does it not, and did it not at that time?

A. Yes, sir.

75 Q. In going over the crossing from the south side as Mistschook did, are you driving in a general northwesterly direction, is that right?

A. I would say northeasterly direction.

Q. Northeasterly direction?

A. I would say so, yes.

Q. Then he would be driving east over the tracks—you are assuming the tracks run north and south?

A. North and south, yes.

Q. The tracks run north and south; this highway runs diagonally across the tracks?

A. Yes, that would be driving northeast.

The Court: There is no question about that, is there?

Mr. Cannon: The fact is that the entire line of the Erie Railroad runs east and west and the railroad people called it east and west bound trains, but at this particular point the track comes down and goes north and south.

The Court: Directly north and south?

Mr. Cannon: Practically north and south, as I understand it.

The Witness: Through Sloatsburg.

The Court: It would help the jury to call it east and west.

The Witness: I have a map here.

The Court: Let me see it.

(The witness produces a paper and hands it to the Court.)

The Court: The witness states he has a map that came into his possession when he was chairman of the Board of Education up there in connection with some movement to lessen the danger of grade crossings for school children.

76 Mr. Cannon: I except to the remark just made by the Court.

The Court: Did the jury hear what I said just now? Is there anybody that heard it?

Juror No. 6: I did.

The Court: It is not evidence. You know it is merely a remark of the Court. Did it find lodgment in your mind at all?

Juror No. 6: No.

Mr. Smyth: Your Honor may ask the jury to disregard it.

The Court: Yes, you may disregard it.

Mr. Cannon: We have a map which was made in connection with this accident shortly afterward, a month afterward.

The Court: Proceed with the trial.

By Mr. Cannon:

Q. In approaching this crossing of the tracks from the south, on the side that Mistschook took, the east bound track was nearer to him; on which side, the right-hand or the left-hand as he was going along to the crossing?

A. As he was driving up to the track the way the road was running, if he stood facing the track, his right hand would be the nearest to the track.

Q. Would he be looking in a direction towards the direction in which the train came from as he drove toward the crossing?

A. Not square.

Q. But would he be on a slant?

A. Diagonally.

Q. You stated on your direct-examination that as you came to this crossing at a point about ten or twelve feet from the east bound track there was nothing to obstruct your view in the direction in which this train came?

A. Yes, sir; between ten and twelve feet.

77 Q. Did you make that observation by making measurements with a tape line or anything of that sort?

A. Yesterday morning Waldron and I took a few measurements.

Q. Yesterday morning?

A. Yes, sir.

Q. That is the one thing you have done in the way of taking measurements?

A. Yes, that is all in the line of measurements.

Q. How far would you say that the station building is from this highway crossing or was at the time?

A. Probably between six and seven hundred feet.

Q. This track is practically straight all along through there by this crossing to the station?

A. Nearly half a mile, I should judge, straight.

Q. On both sides of the crossing?

A. Yes, sir.

Q. When you came to this crossing on this morning which was about seven o'clock, as I understand it?

A. Somewhere near there.

Q. About seven o'clock you stated the crossing bell was ringing?

A. Yes, sir; I heard the bell ringing.

Q. Did you look up or down the track to see whether any trains were around?

A. Yes, sir.

Q. Why did you do that?

A. It is customary if you hear a bell ringing.

Q. Where were you going that morning?

A. I had heard of the accident and I just went down there to see the damage out of curiosity.

Q. You did not go over the crossing, did you?

A. I did not cross over.

Q. You stayed on the south side?

A. Yes, sir.

Q. Who was there while you were there?

A. Oh, there were a number of people and still I could not name them, I know I saw Mr. Clark there.

Q. Who is Mr. Clark?

A. He is the foreman of the track gang in that section, and Warren Waldron, Benton Waldron, and, I think Jacob Waldron.

78 Q. He was the undertaker?

A. No, Warren Waldron was the undertaker.

Q. Did you look down towards the station that morning after you got there?

A. Yes.

Q. Did you look towards the west or in the opposite direction from the station?

A. Yes, sir; while I stood around there I looked both up and down.

Q. Had that bell stopped ringing when you left there?

A. It was ringing when I left.

Q. Had it stopped during the time you were there?

A. No, sir.

Redirect examination by Mr. Smyth:

Q. I did neglect to ask you, what public positions have you occupied in Sloatsburg—I want to know something about your standing in the community there.

A. I was one of the judges for four years of the county, a justice of the peace.

Q. What else were you, that is what you mean by judge, is it justice of the peace?

A. Yes.

Q. What other position have you occupied?

A. I have been a member of the school board for the last ten or eleven years—nine years continuously and I was off for a year and then re-elected again.

Q. You were president of the school board once?

A. Yes, sir; and am at the present time.

Q. The schoolhouse there is shown in the Exhibit 2, is it not?

A. (The witness examines the photograph handed him by counsel.) Yes, sir (pointing out). That is the top of it, that gable there that shows in the tree tops.

Q. This map which you produced and showed to the Court is a map that you had not shown me at all, I knew nothing about it?

A. I showed it to nobody but the Court just now.

79 Q. It is a map made in 1907?

A. I presume it was in 1906 or 1907.

Q. It says "Revised January 5, 1907"?
A. Yes, sir.

Mr. Smyth: I am perfectly willing this should go into evidence if you will permit it.

Mr. Cannon: I do not think it should go in. This was prepared for the purposes of this trial (indicating a sketch produced by the defendant).

Mr. Smyth: This was prepared before the accident. Do you object to it going in?

Mr. Cannon: Yes.

Mr. Smyth: Then I will have it marked for identification.

The paper so identified was then marked Plaintiff's Exhibit No. 4 for identification.

By Mr. Cannon:

Q. Can you state whether the time you arrived there was before seven o'clock or after seven o'clock?
A. I could not say. I would sooner say it was shortly after seven.
Q. You arrived there, you say, shortly after seven?
A. Yes, sir.
Q. About how many minutes after seven?
A. It would not be over ten.
Q. About ten minutes after seven?
A. About; yes, sir.
Q. You stayed there for about how many minutes?
A. Between fifteen and twenty minutes.

By Juror No. 6:

Q. I would like to know why that map was drawn and what the object of it was.

80 Mr. Cannon: We object to that.

The Court: It is not in evidence at this time and you cannot consider it now.

By Mr. Smyth:

Q. That map, Plaintiff's Exhibit No. 4 for identification, shows profiles and shows where the embankments are, does it not?
A. Yes.
Q. Are there any things on that map that you added to the map after you got it or is it just as you got it?
A. Just as I got it.
Q. In 1907?
A. Yes.
Q. So far as you know, does it correctly represent the elevations and profiles and also the plans?
A. So far as I know; yes, sir.

Unless there is objection to it.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

The Court: It has been marked for identification.

Mr. Smyth: I offer in evidence the map.
Mr. Cannon: May I examine the witness on the voir dire?
Mr. Smyth: On the map?
Mr. Cannon: Yes.
The Court: You may.

By Mr. Cannon:

Q. Mr. Finch, you are not a civil engineer?
A. No.
Q. You did not prepare this map?
—. No.
Q. You did not make the measurements?
A. No.
Q. On which the map was made?
A. No.
Q. You don't know anything about the measurements?
A. No.
Q. You did not check it up?
A. No, sir.

81 By Mr. Smyth:

Q. Who did make it?
A. I don't know, sir. Some of the Erie officials, I presume.

Mr. Cannon: I move to strike out the last part of that answer.
The Court: Strike it out.

Q. Do you know whether it came from the Erie Railroad?
A. No.
Q. It came to you in your official duties as president of the Board of Education, didn't it?
A. It came to the school board; I don't know who got it first, but I being the chairman of the board, it was given to me and I have taken care of it ever since. I don't know as any one ever had it in their hands but myself, and it just entered my head last night that I had it.

By Mr. Cannon:

Q. There are some marks on there that were not, I think, in existence at the time of this accident?
A. Yes, sir.

By Mr. Smyth:

Q. You mean there are some red lines?
A. Red lines; yes, sir.
Q. That were in the nature of proposals?
A. Yes.
Q. The red lines show what are proposals and the rest shows what is the actual condition there?

Mr. Cannon: I object to that.
The Court: Objection overruled. You opened the door.
Mr. Cannon: Exception.

The Witness: That is right.

82 Mr. Smyth: I now offer to read the deposition of William Hahn, whose testimony was taken before a referee in the Village of Sloatsburg, Mr. Von Bernuth attending for the railroad company, and I attending for the plaintiff. The jury will understand that this is read with the same effect as if the witness were here present (reading):

"WILLIAM HAHN, called as a witness in behalf of the plaintiff, being duly sworn, says:

"Direct examination by Mr. Smyth:

"Q. You live here in Sloatsburg, Mr. Hahn?

"A. Yes, sir.

"Q. With respect to your ability to come to New York, to attend the trial of this action, what information can you give us about that?

"A. About what?

"Q. Whether you can come?

"A. I don't think I can come there because I have been in bed ever since you went away from here before. I just got up this morning, around twelve o'clock. I had to have the doctor night before last.

"Q. What are you suffering from?

"A. Dropsy and Bright's disease.

"Q. What has the doctor advised you with regard to your life, if he has advised you, regarding taking trips?

"A. Yes, sir; he has advised me against riding on trains. He told me not to ride on them at all so that I would not receive the jar as it would jar my kidneys; leakage of the kidneys is what I really have, he said, and I could stand no jar.

"Q. Did he say what might happen if you did?

"A. He said it would be hard to tell what would really happen. The first doctor I had was here and he gave me three weeks to live in; but Doctor Dann, he brought me around so far.

83 "Q. Under those circumstances, you decline to come to New York?

"A. Yes, sir.

"Q. You have been a sufferer from Bright's disease for how long?

"A. About five months, now, nearly.

"Q. During that time have you been in bed much or little?

"A. In bed the biggest part of the time.

"Q. You say you have been in bed?

"A. Yes, ever since you been here, up to twelve o'clock today.

"Q. And that was a week ago?

"A. Yes, sir.

"Q. What is your occupation, or what was it?

"A. Tinsmith.

"Q. Was that your occupation on March 3d, 1909?

"A. I just got laid off from tinsmith and I had nothing to do and I took a job up here at Johnstown, N. Y., with Austin Conklin.

"Q. Whom do you live with?

"A. My father.

"Q. Do you remember the 3d of March, 1909, when an accident happened to a man by the name of Stephen Mistschook?

A. Yes, sir.

"Q. Where were you at that time?

"A. I will show you right where I was (referring to photograph produced by counsel). (Witness marks with cross on photograph which is now marked for identification Plaintiff's Exhibit 1.)"

Mr. Smyth: May I show the jury the cross that the witness made on the photograph? He was standing right there where he made the cross (showing). This is Plaintiff's Exhibit 2 on this trial.

"Q. What were you doing at the time, Mr. Hahn; where were you going?

"A. I was going to work.

"Q. What time of day was it, in the morning?

"A. Yes, sir.

"Q. You have marked this cross on Plaintiff's Exhibit 1 for identification nearly or directly opposite the first house from
84 the railroad sign, is that right?

"A. Yes, sir.

"Q. Whose house is this?

"A. That is Mr. Sloat's.

"Q. Does this picture correctly represent the situation as it existed on that day?

"A. Yes, sir; exactly.

"Q. Showing the tracks of the defendant company, and showing the signboard?

"A. Yes, sir.

"Q. Was there anything on that signboard in the way of a signal, or anything of that kind?

"A. It said 'Railroad Crossing,' and on the bottom it said, 'Look out for the cars.'

"Q. Besides that was there any bell?

"A. Yes, there was a bell on there.

"Q. How long had you known that to be there?

"A. Ever since I can remember.

"Q. How old are you?

"A. I will be twenty-six the 23d of this month.

"Q. Have you lived here all of that time?

"A. Yes, sir.

"Q. You say the bell did ring on the approach of trains?

"A. Yes, sir.

"Q. And that you had noticed for years?

"A. Yes, sir.

"Q. Did you know that was known as an automatic signal bell?

"A. Yes, sir; there was a place down by the depot and when the engine ran over it it started to ring and rang until the trains were over.

"Q. Coming down to the time of the accident, Mr. Hahn, just state, first what you saw; where Mistschook was when you first saw

him, and give us the picture from your memory of just what you saw of — with my mother-in-law at the time the accident happened. Sanford Conklin also boarded at the same place. He and I were working for the same man and he started out ahead of me
85 that morning and I wanted to get ahead of him, so there was a freight coming——

"Q. That means coming down to this crossing?

"A. Yes.

"Q. And by the way, what road is this crossing on?

"A. It is the road that comes down by the school house.

"Q. Has it any name?

"A. I don't think it has.

"Q. Is this road known as Haverstraw Road?

"A. Goes by that name—up, going west, and I got on the caboose, and I jumped off by the crossing——

"Q. You were over in front of your house and that is north of where the Haverstraw road crosses the tracks?

"A. Yes.

"Q. And that is, you say, coming towards the Haverstraw Road?

"A. Yes, right up towards our house, coming towards the Haverstraw Road.

"Q. You rode on over from your house to the Haverstraw Road then what did you do?

"A. I got off at the crossing, and I was turning around looking to see if I saw Sanford Conklin and see if he came up the road, the railroad, and I was looking for him and I could not see him. He was ahead of me, that was what was drawing my attention back. I saw this man standing there with a horse and wagon.

"Q. Where was he standing?

"A. He was standing about twenty feet from the railroad crossing.

"Q. On which side, please?

"A. On the——

"Q. Can you show us on the picture where he was standing?

"A. (Witness marks with a circle on the picture, in the middle of the Haverstraw road, where he saw Mistschook standing.)

"Q. In what direction is that coming towards the depot, on the picture?

"A. I would call it west.

"Q. What you mean to say is, showing the position of the
86 circle in the picture, that he was twenty feet south of the east bound track, is that right?

"A. Yes, sir.

"Q. You say you saw him standing there?

"A. Yes.

"Q. As you got off the caboose, that is, the caboose was the rear car on the freight train?

"A. Yes, sir.

"Q. Was this bell ringing?

"A. It was ringing then; yes, sir.

"Q. When did you first hear it ring?

"A. When I got off the caboose.

"Q. Do you know whether it was ringing before that?
"A. I could not swear to that.
"Q. Did it continue to ring?
"A. All the while I was there; yes, sir.
"Q. How long were you there?
"A. About twenty minutes.
"Q. Had you known before this bell to ring continuously?"

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.

Mr. Smyth: It is a long time back I guess, to make it competent, and so I withdraw it. (Reading.)

"Q. What have you noticed whether or not trains were in sight when the bell was ringing?"

Mr. Cannon: Same objection to that.
Mr. Smyth: That is right at the time.
The Court: Objection overruled.
Mr. Cannon: Exception.

Mr. Smyth (reading):

"A. The train that hit the man, that was in sight.
"Q. Did it continue to ring after that train went away?
"A. I was not there when that train went away. It rang while that train was there. I went away before that train went away.
87 "Q. In other words, the bell was ringing all the time you were there?
"A. Yes.
"Q. How long were you there?
"A. About twenty minutes.
"Q. You say he was standing about twenty feet south of the east bound track, on the left of the picture is shown a rise in the earth, can you describe how it, the earth, was at that time?
"A. It is just the same as it is now, exactly.
"Q. How close to the track did that rise in the earth come?
"A. I do not know exactly how close.
"Q. When you got off the caboose and saw Mistschook twenty feet away from the track, at that time did you see any other train than the freight train?
"A. I didn't see any other train but this freigh- train.
"Q. Did you see him start his horse then?
"A. I did.
"Q. Where were you when he started his horse?
"A. When he started his horse up I was somewhere right in there (indicating on picture).
"Q. Do you mean both of you had not reached the west bound tracks?
"A. I was away from the west bound track. I had crossed it; I got off the caboose there.
"Q. How far away from the west bound tracks were you?

"A. About midway between where I put the cross on the photograph and the railroad track.

"Q. And that would be how far, in distance, from the tracks?

"A. It must be one hundred feet, at least, it's a good hundred feet from there to the railroad track.

"Q. You say it was at that time when you got to the position you have now described that you saw Mistchook start his horse?

"A. Yes.

"Q. At that time, from your position, could you see the train which hit him?

88 "Q. At that time did you see the train which hit him?"

Mr. Cannon: I object to the answer after the words "No, sir," on page 10, as not responsive.

Mr. Smyth: There was no objection made at that time.

Mr. Cannon: I make it now.

The Court: Whereabouts on that page?

Mr. Smyth: Just about the middle. "At that time did you see the train which hit him."

The Court: Objection overruled.

Mr. Cannon: Exception.

"A. No, sir; it was foggy that morning and you could not see very far. It was quite foggy the morning the accident happened.

"Q. Did you hear any signal from any train?"

Mr. Cannon: I object to that as to its form and also on the ground it is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Cannon: Exception.

Mr. Smyth (reading):

"A. No, sir.

"Q. Did you hear any locomotive bell or whistle?"

Mr. Cannon: I make the same objection to that question.

The Court: Objection overruled.

Mr. Cannon: Exception.

Mr. Smyth (reading):

"A. The only bell I heard was the one at the crossing.

"Q. Where were you when you first saw the train that hit him?

"A. I was pretty near by the tree"——

89 The Court: Do you omit the last of that?

Mr. Smyth: Yes.

The Court: It is only negative evidence.

Mr. Smyth (reading):

"Q. Did you at any time up to the moment that he was struck hear any locomotive bell or whistle?"

Mr. Cannon: I object to that as to its form, and also on the ground it is incompetent, immaterial and irrelevant.

The Court: Objection overruled.
Mr. Cannon: Exception.

"A. No, sir.
"Q. You did not?
"A. No, sir."

Mr. Cannon: Same objection to the next question.
The Court: Objection sustained. It does not add anything to the record. It is simply a repetition.
Mr. Cannon: I move to strike out the answer.
The Court: Yes.
Mr. Smyth: The very last, yes. (Reading):

"Q. How far away was the train that struck him when you first saw it?
"A. It was about three hundred feet from the crossing.
"Q. This train was?
"A. Yes, sir.
"Q. That train was coming on what track?
"A. The east bound track; going towards New York.
"Q. What kind of a train was it: passenger or freight?
"A. It was a fast express passenger train.
"Q. Did you know that train?
"A. I saw it come down every morning.
"Q. Do you know what train it was known as?
"A. I do not know just what they call it.
90 "Q. What time did that train usually pass there?
"A. That train, I think, went down mornings at 5:30.
"Q. What time was it that the accident happened?
"A. It was between 5:30 and 5:45. I don't know exactly the minute, but it was between 5:30 and 5:45.
"Q. On your side of the tracks was there any obstruction at all for you to see up the track?
"A. I could see quite a way only the freight that I came up on, the caboose was right across from this here house (indicating on picture).
"Q. Did you notice how the train was coming with regard to how fast or slow it was?
"A. It was coming fast, and coming fast, too.
"Q. Could you describe its speed in any other way; comparing it with other trains you have seen going?
"A. It was running as fast as I see any of the rest of the expresses go.
"Q. You have seen a great many express trains go by, have you, during your experience here, living right alongside of the railroad track and you have seen expresses, freights and locals go by and you know what speeds are?
"A. Yes, sir.
"Q. This train as it came to this crossing on this foggy morning, how fast was it coming, having in mind the experience of years watching these trains go by?"

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant, the proper foundation not having been laid.

The Court: Objection overruled.

Mr. Cannon: Exception.

"A. It was going fifty miles an hour if it was going one.

"Q. You have been accustomed to watching the speed of trains?

"A. Yes, sir; I have.

91 "Q. Did you see Mistschook as he came towards the track?

"A. Yes, sir; I saw him standing there.

"Q. Then you say you saw him start?

"A. Yes, sir.

"Q. What did he do; where was he?

"A. He was in the wagon.

"Q. Was he driving?

"A. Yes, sir.

"Q. Was he alone?

"A. Yes, sir.

"Q. Single, or a double team?

"A. Double team.

"Q. What kind of wagon was it?

"A. He had a big heavy lumber wagon with a woodrack on it.

"Q. Was he sitting on the driver's seat, or standing?

"A. Standing.

"Q. Where was he standing?

"A. Right up next to the dashboard.

"Q. Did you see the horses as they came along toward the track or not?

"A. Yes, sir.

"Q. How did they approach the crossing with regard to whether they walked, trotted, or how?

"A. They were walking.

"Q. Just then, what was it you saw occur, when the accident happened?

"A. The engine hit right between the horses' hind legs and the front wheel of the wagon.

"Q. Did you see anything happen as the horses approached the track?

"A. I saw the horses when they walked up by the railroad track and then the train met them and slung the horses in the air about sixteen feet.

"Q. You say that your attention was attracted to all of this thing in view of the fact that you were walking in the opposite direction?

"A. I was looking behind for Sanford Conklin.

"Q. That is how you happened to notice?

"A. Yes, sir.

"Q. You say that this early morning was foggy; to what extent was it foggy?"

92 Mr. Cannon: I object to that as incompetent, immaterial and irrelevant and on the ground the answer is not responsive.

Mr. Smyth: I think it is fairly so.

Mr. Cannon: And it calls for a conclusion.

The Court: I think that is an inference. You may present the same inference to the jury, but not that of a witness. Objection sustained.

Mr. Smyth: I submit that is competent because it shows how far he could see, and whether he could see with difficulty or easily.

The Court: If he could see at all it did not matter whether it was with difficulty or ease.

Mr. Smyth: Yes it might, your Honor, because the depot being a very large stationary object, if he could see that with difficulty the jury may then draw an inference whether or not smaller objects, such as a rapidly moving train would be easily seen in a fog when it suddenly appears in the fog.

The Court: The train did not come from the direction of the depot, did it?

Mr. Smyth: No, it went towards the depot. As Mr. Cannon said in his opening, if I recollect rightly, the depot could be seen, and here is a witness who is asked just how far he could see and he describes how it could be seen, otherwise——

The Court: It is perfectly clear what the evidence is.

Mr. Cannon: I think there is no doubt but what this is objectionable on the grounds stated. It calls for a conclusion, as your Honor has already held. There is no doubt about it. I don't think it needs any discussion.

93 Mr. Smyth: I submit that is not a conclusion. He is stating what was the fact at that time he was there, and he himself knew just how far he could see and how distinguishable objects were.

The Court: I see no ground for changing the ruling.

Mr. Smyth: Your Honor will note my exception. (Reading):

"Q. Did you notice whether there was any headlight on this train that struck him?

"A. I did not notice.

"Q. After the train struck him, did you notice how far it went before it stopped?

"A. It went down past the depot, pretty near to the end of the silk mill.

"Q. How far would that be from Haverstraw road?

"A. It would be about seven hundred feet anyhow.

"Q. Is there where the rear of the train stopped, or the front of the engine?

"A. Front of the engine.

"Q. Did you notice how many cars were on this train?

"A. I did not. There were quite some cars on it.

"Q. You say the horses were thrown up in the air when the engine struck; did you see what happened to Mistschook?

"A. No, sir; it was done so quick you could not see.

"Q. Did you see his body afterward?

"A. Yes, sir.

"Q. Where was it when you saw it?

"A. Lying right in the path next to the railroad.

"Q. Can you show on the picture where his body was?

"A. (Taking picture.) I cannot show you exactly, because the picture does not reach there. There is a little path (referring to right edge of picture), which does not show on the picture. It goes down off the Haverstraw road here (indicating on picture), down on the railroad and he laid right straight in it.

94 "Q. How far from where the engine struck the horses and wagon?

"A. About thirty feet.

"Q. You say the horses were thrown in the air?

"A. Yes, sir.

"Q. When the engine struck the horses, it struck right in behind the horses' hind legs and the front wheels, what became of the wagon?

"A. Got smashed to pieces.

"Q. That was thrown too?

"A. Yes, sir; and pieces of it were carried on the cowcatcher.

"Q. When you saw the body of Mistschook, could you tell whether he was dead or living?

"A. He was dead.

"It is conceded that Mistschook was killed as a result of the collision to which the witness refers.

"Q. Did you know Mistschook?

"A. I knew him by sight, but never knew what his last name was. We always called him Steve.

"Q. How far was the rear of the train from the Haverstraw road when it stopped, the train which struck him?

"A. I could not tell you how far, because I do not know how many cars were on it.

"Q. Was the rear of the train in sight from the Haverstraw road when it stopped?

"A. Yes, sir.

"Q. What is your best recollection of how far the rear of that train was——

"A. It was right on this end of the depot, but I could not say how far it was.

"Q. The rear of the train was on the west end of the depot?

"A. Yes, sir; it was on this end towards our house; just opposite the west end of the depot.

"Q. That train remained standing there how long, while you were there?

"A. About twenty minutes.

"Q. What was this bell doing during all that time?

"A. Ringing.

95 "Q. Still ringing?

"A. Yes, sir.

"Q. Do you know where the point is on the railroad where the contact is with the wires that come to that bell?

"A. I did know where it was, but they have taken it away now.
"Q. Did you know then?
"A. Yes, sir.
"Q. Where was that point?
"A. That was right on the west end of the depot, here.
"Q. Was it this side of where the rear of the train stopped?
"A. This side; yes, sir.
"Q. Have you known that bell to ring when there was no train in sight?
"A. Yes, sir."

Mr. Cannon: I object on the ground it is incompetent, immaterial and irrelevant, and I move to strike out the answer, and I also object on the ground it is leading.

Mr. Smyth: It is not connected with the day of the accident, so I assume your Honor's ruling would be the same as before.

The Court: Yes, the questions and answers following show it is not sufficiently connected. Strike it out.

Mr. Smyth (reading):

"Q. This freight train that you jumped off of, was that freight train still in sight when you saw Mistschook start up to cross the track?
"A. The caboose was in sight.
"Q. How far away, about 300 feet from the crossing?
"A. Yes, sir.
"Q. That train was going west, was it?
"A. Yes, sir; the freight was going west.
"Q. Was there any flagman at the crossing?
"A. No, sir.
"Q. And there was no gate there, was there?
"A. No, sir.
96 "Q. Trains that come on the east bound track, do you know if there was a contact point for the wires that connect with the crossing bell east of the road, or is the contact point west, before you come to the road; that is, as it was at the time of the accident and before?
"A. On the east bound track there is one right up yonder, on the east bound track, behind the Manhattan store.
"Q. Is there any contact point on the east bound track east of the crossing?
"A. I don't know whether there is or not. There is one on the west. I don't know whether there is any on the east or not.
"Q. Where was the contact point that you knew of on the east bound track, the contact for the signal bell?
"A. Opposite the Manhattan store.
"Q. That place is west of Haverstraw crossing?
"A. Yes, sir.
"Q. Now, on the west bound track, where is the contact point you knew of?

"A. Right down here by the depot, about fifteen feet from the crossing for the depot.

"Q. That contact point would be east of the Haverstraw road, would it not?

"A. It would; west, coming this way.

"Q. It would be nearer New York, I mean?

"A. Yes, it would be nearer New York.

"Q. Do you know of any other contact points than those you described?

"A. No, only the one up here and the one down there.

"Q. In other words, there was a contact point for the approach to the crossing on each track, is that right?

"A. Yes, sir.

"Q. Were there any other trains in sight during the time that you were at that crossing, except the two trains you mentioned, the freight train and the passenger express?

"A. No, sir; there was not."

97 Mr. Cannon: I will read the cross-examination (reading):

"Cross-examination by Mr. Von Bernuth:

"Q. At the time of this accident, the house which you were living in was east of that crossing, was it not?

"A. Yes, sir; it was.

"Q. How far east?

"A. Right by the depot, there.

"Q. Did you get on the freight train at the depot?

"A. I did.

"Q. And you got on the caboose?

"A. Yes, sir.

"Q. And rode on the caboose up to the crossing?

"A. Yes, sir.

"Q. What side of the caboose did you get off?

"A. I got off on the side towards Haverstraw.

"Q. That is the north side of the crossing?

"A. Yes, sir.

"Q. And away from the side on which the man, Mistschook, was standing with his horse?

"A. Yes, sir.

"Q. There is an upgrade from the station to the crossing, is there not?

"A. I am not sure about that; I never noticed that.

"Q. How fast was the freight train going?

"A. The freight was not going very fast.

"Q. It was going so slowly that you could get on and off without any trouble?

"A. Yes, sir.

"Q. About how fast would you say the freight train was going?

"A. It was going about eight or ten miles an hour.

"Q. As fast as that?

"A. Probably not as fast as that; just so I could get on and off nicely without any sliding.

"Q. You had no trouble in getting on and off?

"A. No, sir.

98 "Q. After you got off the train at the crossing how soon after did you look around?

"A. I was walking and looking at the same time.

"Q. How soon after you got off the train did you first look around?

"A. As soon as I got off I looked around to see if I could see Sanford Conklin.

"Q. And that is when you first saw Mistschook?

"A. Yes, sir.

"Q. It was daylight, was it not?

"A. It was in the morning between 5:30 and 5.45. Yes, it was daylight; yes, sir.

"Q. What side of the crossing did you get off on, the east or west end?

"A. I got off on the west end towards Haverstraw.

"Q. And you looked around immediately?

"A. Yes, sir.

"Q. How soon after you got off did Mistschook start his horse?

"A. I do not know how soon it was; it was very shortly.

"Q. Immediately, did he not?

"A. No, sir; not immediately at all. I could not say how quickly it was; it was very shortly after.

"Q. Can you give an estimate of how shortly he started up?

"A. When the caboose of that there freight which I jumped on was about three hundred feet away from the crossing.

"Q. Is that the first time he started up?

"A. Yes, sir.

"Q. Where were you at that time?

"A. I was going to work.

"Q. Where were you at the time he started up?

"A. I was pretty near by that tree where I marked on the picture.

"Q. You say that was one hundred feet north of the track?

"A. Yes, sir; about one hundred feet.

"Q. You were walking all the time?

"A. Yes, sir.

"Q. And looking around?

"A. Yes, sir.

99 "Q. When did you first see the engine of the express train coming from the west?

"A. When I first saw it, it was coming by the caboose of the freight.

"Q. Where was the caboose of the freight at that time?

"A. It was about three hundred feet from the crossing.

"Q. With respect to the railroad tracks, how far away from them were you when you first saw the approaching engine coming from the west?

"A. I was, I should judge, about ninety feet from the crossing.

"Q. Could you see the engine?

"A. Yes, sir.
"Q. Could you see any other part of the express besides the engine?
"A. Just the engine coming from behind the caboose.
"Q. How many cars were on that freight train?
"A. I don't know just how many cars were on there; it was quite long.
"Q. At that time could you see the rest of the cars on the freight train?
"A. No, sir; you could not.
"Q. How many cars were on it, forty or fifty?
"A. There were more than that on there; it was a very long freight; it was way up past here and a good deal.
"Q. What kind of a wagon was it that Mistschook was driving?
"A. It was a very heavy wagon with a wood rack on.
"Q. Sort of a hayrack?
"A. Just a body with sticks in it. You know how the wood rack is on a wagon to cart cord wood.
"Q. It had a sort of frame above the body of the wagon?
"A. No, sir; just upright sticks.
"Q. Heavy sticks, or light sticks?
"A. About three inches through, they were.
"Q. Did that wagon make any noise when it moved?
"A. Yes, sir.
100 "Q. Did it make quite a lot of noise?
"A. I don't know just how much noise it does make. It is a very heavy wagon.
"Q. Did the freight train make any noise as it went along?
"A. Yes, sir.
"Q. What kind of a noise was it making?
"A. Just ordinary noise; same as the rest of them when they go through.
"Q. A heavy rumbling noise, was it not?
"A. Yes, sir.
"Q. Did that noise continue all the time while you were looking at the freight train?
"A. Not so much; as the freight went out of sight it got less and less.
"Q. What direction were you looking for Conklin?
"A. I was looking right across the railroad; looking to see if he was coming.
"Q. That is in a southerly direction right across the tracks; that is the direction in which the accident happened?
"A. Yes.
"Q. You were looking across the tracks, not along the tracks?
"A. Yes, sir.
"Q. What first attracted your attention to the passenger train coming?
"A. I was looking at the freight.
"Q. I thought you were looking for Conklin across the track?

"A. I was, and I gazed around and was looking at the caboose of the freight, then I turned right back and looked for Conklin again.

"Q. How long was it after you got off the freight that you first looked at it again?

"A. It was nearly three hundred feet away from the crossing there when I was looking.

"Q. When you first looked at it after you got off?

"A. Yes, sir.

"Q. Is that the time when you first saw the passenger train coming along?

"A. The first I saw the passenger train coming along was when it passed the caboose, right opposite the little house there.

101 "Q. I thought you said you first saw the passenger train coming along when the caboose was about three hundred feet away?

"A. Yes, sir; I did.

"Q. Where is the little house which you take as the point at which the passenger train passed the caboose?

"A. (Indicating the house on the picture.) On the left-hand side of the picture, Plaintiff's Exhibit 1 for identification. The house is now marked A on the photograph.

"Q. It was when the caboose was opposite this house marked A on Plaintiff's Exhibit 1 for identification, that you first saw the passenger engine coming out from behind the caboose?

"A. Yes, sir.

"Q. At that time had Mistschook started his horse?

"A. Yes, sir; he had started his horse at that time.

"Q. Where were Mistschook's horses with respect to the eastbound track at the time when you first saw the passenger engine coming out from behind the caboose?

"A. Right in there, somewhere (pointing on photograph).

"Q. How far is that from the track?

"A. It could not have been more than seven feet.

"Q. At that time, were the horses walking slowly or were they trotting?

"A. Walking slowly.

"Q. Did you see the horses at any time change their pace?

"A. No, sir.

"Q. After the accident happened and the passenger train stopped, did the passenger train remain where it stopped all the time you were there?

"A. Yes, sir.

"Q. You left before the passenger train went?

"A. Yes, sir.

"Q. You said you could see the head end of the passenger train as well as the rear end?

"A. I don't think I did.

"Q. Didn't you say the head end of the train stopped down near some mill?

"A. Yes. I did not see the engine by the silk mill.

102 "Q. That is where it stopped?

"A. That is where people told me. I did not go down

there to see where the engine was. I know it was past the depot, because you could just nicely see the depot.

"Q. You could see the depot just a little?

"A. Yes.

"Q. You do not know how many cars were on that train?

"A. No, sir.

"Q. With respect to the west end of the depot, you could not say precisely as to whether the rear end of the train was at that point, or a little east or west of it, could you?

"A. The rear end of the train was on this side of the station, but just how far I could not say. That is west of the station.

"Q. I show you a photograph, and ask you whether it correctly represents the lay of the land at the time of this accident, looking west from the crossing?

"A. Yes, sir.

"Q. It doesn't take in the crossing itself, does it?

"A. No.

"Photograph marked Defendant's Exhibit B for identification.

"Q. I show you another photograph and ask you whether that correctly represents the lay of the land looking west from a point on the Haverstraw road south of the crossing?

"A. Yes, sir.

"Picture marked Defendant's Exhibit C for identification.

"Q. What first attracted your attention towards the oncoming passenger train?

"A. I don't know, I just happened to look up there; to look at the caboose; there was nothing in particular to draw my attention to it. I was just looking, turned around and saw it; that is all I can tell you.

"Q. As a matter of fact you were not looking out for yourself to get across that crossing?

"A. No; I was already across.

103 "Q. You were not listening for any bells or signals, were you?

"A. No, sir; the bell was ringing. The crossing bell I could not help but hear, I got off right by it.

"Q. You were not paying any attention to any other signals at that time?

"A. No, sir.

"Q. When you first saw the passenger train come out from behind the caboose, the horses were within seven feet of the track?

"A. Yes, sir.

"Q. And they were walking?

"A. Yes, sir.

"Q. In what part of the wagon was Mistschook?

"A. He was standing right up in the wagon there; on the wood rack he was standing, up against the dashboard.

"Q. In the front part of the wagon?

"A. Yes, sir.

"Q. Right behind the horses?
"A. Yes, sir.
"Q. Mistschook was on one side of the crossing and you were on the other?
"A. Yes, sir.
"Q. Both about the same distance away from the train, east of the oncoming train?
"A. I was further away from the crossing than he was.
"Q. You were both about the same distance away from the train?
"A. Yes, sir.
"Q. Looking west?
"A. Yes, sir.
"Q. How big were the horses that were on that wagon?
"A. They were big horses. I could not say how big they were though they were a heavy team. They were a very heavy team, I know."

Mr. Smyth: I desire to read from the omitted pages of the cross-examination, from page 25 to page 27 (reading):

"Q. Do you remember Mr. Vail coming to see you?"

Mr. Smyth: I suppose you will concede, Mr. Cannon, that Mr. Vail was in your employ, in the claim department?
104 Mr. Cannon: I do not see how this is competent at all.
Mr. Smyth: It is part of their cross-examination.
Mr. Cannon: It is now part of yours.
Mr. Smyth: I certainly have a right to have the jury understand what knowledge the railroad had of this man's information. I will go on reading if you won't make that concession (reading):
"Q. Do you remember Mr. Vail coming to see you?
"A. I do not remember just who it was. I know there was a man come to see me. I could not tell you who he was any more than if I never saw him before."

Mr. Cannon: I object to the rest of this question as incompetent, immaterial and irrelevant.
Mr. Von Bernuth, will you take the witness stand. You need not swear Mr. Von Bernuth. I will take his statement.

RUDOLPH L. VON BERNUTH, counsel for defendant, called as a witness by the plaintiff, but not sworn, testifies as follows:

Direct examination by Mr. Smyth:

Q. You are one of the lawyers of the Erie Railroad?
A. I am employed by them, yes.
Q. You were present at the time this examination of this witness was taken with me and represented the road at that time?
A. I was.
Q. There was a Mr. Vail present there with you, was there not?
A. Yes.
105 Q. He came there at your invitation?
A. Yes.

Q. Who is he?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.

Objection overruled.

Mr. Cannon: Exception.

A. He is a lawyer.

Q. What is his connection with the road?

A. He has none at the present time, I understand, I don't know.

Q. What was his connection at the time, shortly after this accident happened?

A. I don't know what he was.

Mr. Cannon: Special agent.

Q. Mr. Cannon suggests that he was a special agent?

A. I don't know what his exact position was.

Q. I don't know what a special agent of the Erie Railroad means. Will you tell me what does special agent mean?

A. I understand a man connected with the claim department.

Q. Had he been authorized to see witnesses and get statements from them by the defendant?

A. I don't know that.

Q. To be frank, you were the attorney in charge of this case, won't you state just what Mr. Vail's connection with the case was?

A. Mr. Vail had taken a statement from this man.

Q. From this witness Hahn?

A. Yes.

Q. He did it on behalf of the railroad?

A. Yes, I suppose he did. I found it in the railroad files.

Q. You have not any doubt but that he represented the railroad in taking that statement?

106 Mr. Cannon: None whatever. He was special agent connected with the claim department of the railroad at the time.

Mr. Smyth: And authorized to do what he did do in reference to getting statements in this case.

Mr. Cannon: Of course I object to it as being incompetent, immaterial and irrelevant.

Mr. Smyth: Is that the fact?

Mr. Cannon: That is the fact, of course.

(Witness Von Bernuth leaves the stand.)

Mr. Smyth (reading):

"Q. Do you remember Mr. Vail coming to see you?

"A. I do not remember just who it was. I know there was a man come to see me. I could not tell who he was any more than if I never saw him before. I believe he was an Erie claim agent.

"Q. Look at Mr. Vail (pointing to gentleman in the room) and see if you do not remember him as the man that came to see you?

"A. I don't remember his looks.

"Q. You made a statement to him, did you not?

"A. Yes, sir.

"Q. I show you this paper (handing paper), and ask you if you recognize it, is that your signature (showing)?

"A. Yes, sir.

"Q. Is that your signature?

"A. Yes, sir.

"Paper consisting of two sheets marked Defendant's Exhibits A-I and A-II for identification.

"Q. You told this man that saw you what you knew about the accident, did you?

"A. Yes, sir.

107 "Q. Did you read the paper over before you signed it?

"A. You've got me. It's so long ago I forget whether I did or not.

"Q. What is your best recollection; is it that you did?

"A. It is so long ago I cannot say, I have forgotten.

"Q. These two sheets marked Defendant's Exhibits A-I and A-II for identification, is the statement you made to the claim agent, is it not?

"Q. I show you Defendant's Exhibits A-I and A-II and ask you if that is the statement you made?

A. (Witness apparently reads the statement handed to him.) Yes, sir.

"Mr. Smyth: I ask Mr. Von Bernuth to see the statement the witness has been reading.

"Mr. Von Bernuth: I decline to show it."

I ask to see it now.

Paper produced by defendant's counsel.

Mr. Smyth: I offer that in evidence.

Received in evidence and marked Plaintiff's Exhibit No. 5.

(Mr. Smyth then reads Plaintiff's Exhibit No. 5 to the jury.)

Mr. Smyth: Will you concede, Mr. Cannon, that that is the same person as William Hahn, this man who is mentioned here as Hand.

Mr. Cannon: Yes.

Mr. Smyth: Whose handwriting is the body of the statement, Mr. Cannon?

Mr. Cannon: Mr. Vail's.

Mr. Smyth: It is conceded that the body of the statement is in Mr. Vail's handwriting.

In view of this testimony, that he could see the depot, I

108 ask your Honor to reconsider your ruling in regard to the question on page 14.

"Q. You say that this early morning was foggy; to what extent was it foggy?"

I ask to read the answer to that question.

Mr. Cannon: I assume this will be re-direct examination of the witness. That is the status now, isn't it?

The Court: I will allow it.

Mr. Cannon: Exception. I make the same objection as heretofore, and on the ground it is not re-direct examination.

Mr. Smyth (reading):

"Q. You say that this early morning was foggy; to what extent was it foggy?

"A. You had a hard job to see down as far as the depot."

Now, on page 29 I will go on with the redirect examination. (Reading):

Redirect examination by Mr. Smyth:

"Q. Where you were, there was a rise from the track, was there not, somewhat?

"A. Yes, sir, some.

"Q. Where he was, what was there to obstruct his view?

"—. ——.

"Q. What was there that was behind him to the west as he would look west (handing photograph)?

"A. This here grade business—this grade business here, meaning the rise in the ground shown on the left-hand side of the picture.

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant and calling for a conclusion and as leading and I move to strike out the answer.

The Court: Motion denied.

109 Mr. Cannon: Exception.

Mr. Smyth (reading): "Meaning the rise in the ground shown on the left-hand side of the picture.

"Q. That would obstruct his view towards the west?"

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant, and as calling for a conclusion.

The Court: Objection sustained.

Mr. Smyth: Exception.

I will read from page 31, near the bottom (reading):

"Q. You said you were not paying any attention to signals. I ask you whether if any locomotive bell had been rung, or whistle blown, would you have heard it?"

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant, and on the ground it calls for a conclusion, and also it is leading.

Mr. Smyth: That goes to whether he was in a position where he would have heard.

The Court: It is negative testimony, at best.

Objection overruled.

Mr. Cannon: Exception.

Mr. Smyth (reading):

"A. If they had blown I certainly would have heard them.

"Q. And if a locomotive bell had rung you would have heard it?"

Mr. Cannon: I make the same objection to that.

The Court: Same ruling.

110 Mr. Cannon: Exception.

Mr. Smyth (reading):

"A. Yes.

"Q. Was any signal sounded after he had struck the man and stopped?

"A. Yes, he blew there for quite a while.

"Q. Then you did hear a whistle blow after the accident?

"A. Yes.

"Q. Is that the only time you heard it?

"A. Yes, sir."

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant, and on the ground that calls for a conclusion.

The Court: Objection overruled.

Mr. Cannon: Exception.

Mr. Smyth (reading):

"A. Yes, sir."

Mr. Cannon: I move to strike out the answer on the same grounds.

The Court: Motion denied.

Mr. Cannon: Exception.

Mr. Smyth (reading):

"By Mr. Von Bernuth:

"Q. You signed the statement, Defendant's Exhibit A-I and A-II for identification, did you, 'William Hand'?

"A. Yes, sir.

"By Mr. Smyth:

"Q. Please explain why you happened to sign 'Hand' when your name is spelled Hahn?

"A. Everybody around here always spells it that way, and we always spell it that way here, in the place."

Mr. Cannon: I reserved the right in reading the cross-
111 interrogatories, that if I found these photographs, to offer them in evidence in connection with the testimony of the witness Hahn. I will read the question and answer (reading):

"Q. I show you a photograph and I ask you whether that correctly represents the lay of the land at the time of this accident, looking west from the crossing?

"A. Yes, sir.

"Q. It does not really take in the crossing itself, does it?

"A. No."

Photograph marked Defendant's Exhibit B for identification.

Mr. Cannon: I now offer in evidence the photograph referred to in the deposition as Defendant's Exhibit B for identification.

Mr. Smyth: When was this taken?

Mr. Cannon: April 22nd, 1909.

Mr. Smyth: I make no objection to their coming in for whatever they may be worth.

Mr. Cannon: I offer in evidence Defendant's Exhibit B, in the deposition, and I also offer in evidence the photograph known as Defendant's Exhibit C for identification.

The photographs so identified were received in evidence and marked Defendant's Exhibits A and B.

Defendant's Exhibits A and B were then shown to the jury by counsel.

Mr. Smyth: I move to amend the complaint so that the subdivision marked 4 shall read in accordance with the notice to amend the complaint which was served on the attorney for the defendant on the 29th of December, 1913, and I offer in evidence the amendment.

Received in evidence and marked Plaintiff's Exhibit No. 6.

112 Mr. Smyth: The plaintiff rests.

Mr. Cannon: I move to dismiss the complaint on each and all of the following grounds:

First, the plaintiff has failed to establish a cause of action against the defendant.

Second, that the plaintiff has failed to prove that the deceased was free from contributory negligence.

Third, that it affirmatively appears that the deceased was guilty of contributory negligence.

Fourth, that there is no proof whatever that the deceased looked or listened before attempting to cross the track.

Fifth, that plaintiff has not the right to sue in this action.

I press that motion.

The Court: Decision reserved.

FREDERICK W. MEDRICK, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. Cannon:

Q. Mr. Medrick, state your occupation and residence.

A. Photographer, my residence is at Middletown.

Q. Middletown, New York?

A. Middletown, New York.

Q. How long have you been a photographer?

A. About fourteen years.

Q. In the month of April, 1909, did you make some photo-

113 graphs of the Haverstraw crossing at Sloatsburg at the request of the defendant?

A. I did.

Q. I show you this photograph and I ask you if you made that photograph.

A. (The witness examines the paper handed him by counsel.) Yes.

Q. From what point was that photograph taken?

Mr. Smyth: First, ask him when it was taken.

Q. When was it taken?

A. If I may be allowed, I have the notes made at the time. Of course, I can not remember, it is so long. These were made at the time it was taken.

Q. You may refresh your recollection.
A. On April 22, 1909, starting at 2:30 P. M.
Q. From what point was the photograph which you hold in your hand, taken.
A. It was taken from a point five feet south of the south rail of the east bound track, looking west.
Q. That shows the situation as it was on the day that you took that picture?
A. Certainly.

Mr. Cannon: I offer in evidence the photograph.
Mr. Smyth: No objection.
Received in evidence and marked Defendant's Exhibit C.

Q. Your camera was where, with respect to the road?
A. Five feet south of the south rail of the east bound track.
Q. Where was it, in the highway?
A. I cannot recall exactly, but I can tell by looking at the picture (the witness examines the photograph, Exhibit C). It was taken from the highway.
Q. In what part of the highway, I mean with respect to the sides?
A. I should say about the center of the highway.
114 Q. What was the height of your camera?
A. I think it was just a little less than five feet, perhaps two or three inches under five feet.
Q. Practically five feet?
A. About.

By the Court:

Q. What is the effect on the photograph obtained of having the lens nearer the ground or farther from the ground?
A. Your Honor, if the lens is level, that is, pointed straight away, the only effect is that if it were lowered it would show more of the foreground, that is nearer to the foreground.
Q. Would not it exaggerate the ground near at hand as compared with the ground the scene in the perspective?
A. Of course, there is a foreshortening always in a photograph.
Q. What is your answer, yes or no?
A. I don't think it would exaggerate it.
Q. You say you don't think it would exaggerate it?
A. Yes.

By Mr. Cannon:

Q. That is, it would show more of the foreground?
A. It would be larger in proportion.
Q. The distance would be practically the same?
A. Practically.
Q. I show you another photograph and I ask you if you prepared that?
A. (The witness examines the photograph handed him by counsel.) Yes.
Q. That was made on the same day as the other photograph?

A. I made it after the other one.
Q. From what point was that taken?
A. This was ten feet south of the south rail of the east bound track, looking west.
Q. Your camera was in what place on the road?
A. About the center.
115 Q. With respect to its sides?
A. About the center, practically the same except farther from the rail.

Mr. Cannon: I offer that in evidence.

By the Court:

Q. How high was the camera from the ground in taking this?
A. It was practically the same in height, about five feet.

Mr. Cannon: I offer that in evidence.
Mr. Smyth: No objection.
Received in evidence and marked Defendant's Exhibit D.

By Mr. Cannon:

Q. I show you Defendant's Exhibit A in this case, and I ask you if you made that photograph?
A. (The witness examines the paper handed him by counsel.) I did.
Q. On what day?
A. April 22, 1909.
Q. That picture was made in the Haverstraw road, was it not, at Sloatsburg?
A. Yes.
Q. Where was your camera stationed?
A. The camera was at about the center of the highway, fifteen feet south of the south rail of the east bound track looking west.
Q. And the height of your lens was what?
A. About five feet.
Q. I show you Defendant's Exhibit B in this case, and I ask you if you made that photograph?
A. (The witness examines the paper handed him by counsel.) I did.
Q. When and where?
A. In Sloatsburg, on April 22, 1909.
Q. In the Haverstraw road?
A. Yes.
Q. Where was your camera stationed, and how facing when that picture was made?
116 A. The camera was stationed about the center of the highway, twenty feet south on the south rail of the east bound track, looking west.
Q. What was the height of your camera?
A. About five feet.
Q. You used the same tripod for all these pictures?
A. Exactly.

Q. I show you a photograph and I ask you if you prepared that or made that photograph?

A. (The witness examines the photograph handed him by counsel.) I did.

Q. When and where did you take it?

A. At Sloatsburg, on the 22nd of April, 1909. It was taken from about the centre of the highway, twenty-five feet from the south rail of the east bound track, looking west.

Q. Your camera was about where?

A. About five feet high.

Q. The lens was about five feet high?

A. Yes.

Mr. Cannon: I offer that in evidence.

By Mr. Smyth:

Q. The right-hand corner of the picture indicates, does it not, that your camera was over to the left-hand side of the road and not in the middle of the road?

A. No, the camera was about the center of the road.

Q. No part of the road is shown in the picture, is it?

A. Well, it was not taken the way the road runs. It was taken up the track.

Q. This was wide angle lens?

A. No, a regular angle, not a wide angle.

Q. The whole road, the Haverstraw road, is still to the right of what is shown in the picture, isn't it? No part of the Haverstraw road is shown, nor the place where camera was standing—you do not see any wagon tracks or anything there—there is no part
117 of the road shown where the camera is standing at all?

A. The edge of the road.

Q. Just the left-hand edge?

A. That is just the edge of the road right there, you see the camera sets about in the center of the road.

Q. That is just what I don't see. I hear you say so.

A. The road at that point does not run squarely across the tracks.

Q. So that if you were to move your camera a foot or a foot and a half to the left or the right of the center of the road, you would see very much more to the left than you would if you had it in the center?

A. Yes.

Q. So it is a question of inches as to where you get your camera as to what you see, is that right?

A. Yes.

Q. The question of inches would mean a great many feet even in the picture taken by the lens?

A. Distance?

Q. Yes?

A. Yes.

Mr. Smyth: That is all. With that understanding. I have no

objection, but there I may say the same criticism may be made of all these pictures.

Mr. Cannon: You can do that in cross-examination, Mr. Smyth.

Mr. Smyth: All right.

Received in evidence and marked Defendant's Exhibit E.

By Mr. Cannon:

Q. Does Defendant's Exhibit E show at the right-hand corner a part of the highway? It does, does it not?

A. Yes.

Q. It shows the highway across the track?

A. Yes.

Q. This is a camera having a plate?

118 A. The plate is 6½ by 8½ and, of course, that is trimmed a little bit.

Q. You were taking the views down the track, from the center of the road, towards the west?

A. We call it up the track, towards the west.

Q. And that is the direction from which the east bound trains came?

A. Yes.

Q. If your camera had been five feet higher than it was, in other words, if it had been ten feet, would it showed more or less of the track in the distance, because of that sloping embankment?

A. I can tell by looking.

Q. If you were up in the air?

A. (The witness examines the photograph handed him by counsel.) From that point, I do not think that five feet higher would make much difference. The camera, of course, the lens, you might say, is a trifle lower than the eyes of a person standing.

Q. That is, you stoop as you look into it a bit?

A. Yes, a bit.

Q. In making the adjustment?

A. Yes, and at that point of the road I doubt if five feet higher would show much further, possibly a trifle farther.

Q. The bank sloping back, as it does there, if you got up above the bank or nearer the top of it, would you have a greater view in the distance than the track?

A. If you got up on top of the bank?

Q. If you got up in the air?

A. Naturally.

Q. This, however, slopes back from the track, doesn't it?

A. I think so, naturally.

Q. It slopes?

A. Yes.

Q. At an angle?

A. Yes.

Q. I understand this photograph, Defendant's Exhibit E, is twenty-five feet from the crossing?

A. Twenty-five feet.

Q. The road at that place crosses diagonally, does it not?

A. Yes.

119 Q. That is the reason why you see a part of the road on the other side of the photograph?

A. Yes.

Q. In these pictures?

A. Yes.

Q. The camera pointed west?

A. Yes.

Q. I understand that the right-hand lower corner of the photograph, Exhibit E, is the side or edge of the road?

A. It is the side, you can see the wagon track there, I think.

Q. I show you a photograph and I ask you if you made that?

A. (The witness examines the paper handed him by counsel). I did.

Q. When and where?

A. At Sloatsburg, on April 22, 1909. That was taken from the center of the highway, 30 feet south of the south rail of the eastbound track looking west.

Q. And the lens was how high?

A. About five feet high.

Mr. Cannon: I offer that in evidence.

Received in evidence and marked Defendant's Exhibit F.

Q. This photograph is how many feet?

A. Thirty feet.

Q. Does that show also a piece of the road south of the track?

A. Yes, a portion of the highway, a little more than the other.

Q. It shows the highway on the other side of the track?

A. On the other side of the crossing.

Cross-examination by Mr. Smyth:

Q. Exhibit D was taken how near to the track?

A. Ten feet from the rail.

Q. It was practically taken right over this ditch, wasn't it?

A. The camera set in the center of the highway.

120 Q. It was on a line with the ditch, wasn't it?

A. Not quite. The line would be right square in the center of the photograph.

Q. You say this highway went over diagonally. Isn't it so that just at the track, as shown in Exhibit 1, the highway turns so as to go at right angles and then turns diagonally and it approaches diagonally, and then turns and goes over straight, and then turns and goes over diagonally?

A. I don't think this photograph shows it that way. It shows it diagonally.

Q. You think it shows it going over diagonally, as it crosses the track?

A. Yes.

Q. There is a decided turn in the highway there?

A. Yes.

Q. A change in direction from the way it leaves the track facing north, than the way it approaches the tracks facing north?

A. Yes.

Q. It is more diagonal after it crosses the track, that is, it goes more in a westerly direction after you cross the track than before you get to the tracks, going north, isn't that right?

A. Yes, but as I remember it, it was a trifle diagonal across the tracks. That is, it did not cross exactly at right angles, from that photograph I should judge that was so.

Q. Did you mean to say that in Exhibit A the camera was in the middle of the highway?

A. Yes.

Q. Wasn't it more to the left-hand side?

A. Practically in the center.

Q. You say practically in the center. It may have been more to the left than in the center?

A. Well, perhaps, two or three inches.

Q. That would make a good deal of difference in the distance shown to the left?

A. Practically none in the distance.

Q. Didn't you say a little while ago that it would?

A. In the amount of the highway that is shown in the corner.

121 Q. In the distance to the left that you see of the track it would make a good deal of difference?

A. I don't see why it should make any difference.

Q. Didn't you tell us a little while ago——

A. I don't recall.

Q. Do you make photographs for the Erie Railroad often?

A. Not often.

Q. How often?

A. I have not made any for them now since about that year, 1909.

Q. You have made photographs for them whenever there has been occasion for it, for photographs?

A. No.

Q. This is not the only case?

A. I have made them in possibly five or six cases.

Q. You made them in possibly five or six cases?

A. Yes.

Q. For any other road?

A. Yes, for the O. & W.

Q. And others besides that?

A. That is all.

Q. Are you employed by Mr. Watts' law firm in Middletown?

A. I am not.

Q. You know that law firm?

A. Yes.

Q. You have been employed by that law firm, haven't you?

A. Not steadily. I have worked for them.

Q. Whenever they have had railroad cases, defending railroads,

and it was necessary to get a photographer in Middletown, you have been the one they have gone to?

A. No, they have not employed me regularly.

Q. They have occasionally, haven't they?

A. Not on the Erie. Mr. Vail employed me on this case.

Q. I am talking about the O. & W., of which Mr. Watts is the attorney.

A. I have taken the photographs two or three times, but not regularly.

Q. Are you familiar with Sloatsburg?

A. No.

Q. You do not know anything about the condition of fog in that cut in the morning?

A. No.

122 Q. That it is usual?

A. No.

Q. What?

A. That is the only time I ever stopped off there. I have gone through Sloatsburg lots of times.

Q. What time of the day did you take Exhibit C?

A. What number is that?

Q. Number 1.

A. At 2:30 in the afternoon.

Q. There is a ditch with water there running alongside of the track, isn't there?

A. Yes.

Redirect examination by Mr. Cannon:

Q. When you testified that a few inches distance in the placing of your camera with respect to the side of the road would not make any material difference in the extent of the view—is that right——

A. It would make practically no difference in the distance away.

By Mr. Smyth:

Q. What distance away?

A. The distance you could see away.

By Mr. Cannon:

Q. When Mr. Smyth examined you on the voir dire in reference to changing the position of the camera of a few inches, you were referring to the view which could be seen of the ground?

A. In the foreground.

Q. When you say the foreground, you mean what is shown at the very bottom of the picture?

A. Yes.

Q. Naturally, it would not have any effect upon what you could see far away?

A. Practically none.

123 Recross-examination by Mr. Smyth:

Q. Are you an expert photographer?
A. I am a profesional photographer.
Q. You know that very funny things can be done with a camera, if you try?
A. Yes.
Q. These moving picture cameras, they can make a man walk up the side of a house, when he is walking on the ground?
A. Yes.
Q. It all depends on how you place your camera?
A. Yes.
Q. You can make a thing look a long distance, which is a very short distance?
A. By the use of wide angle lens.
Q. It depends on how you do it?
A. Yes.
Q. Apparently an expert can make a circle look square?
A. No.
Q. It hasn't got to that yet?
A. No.

By Mr. Cannon:

Q. You did not have a wide angle lens, did you?
A. No, I had a normal angle lens.
Q. Did you make any attempt to distort the view?
A. Absolutely none.
Q. This is a normal picture?
A. This is a normal picture.
Q. You have been an expert photographer for how many years?
A. I have not been expert for fourteen years, but I have been at it that long.
Q. Those very photographs show just what you could see with the naked eye from the place where you were standing——

Mr. Smyth: Is Mr. Medrick testifying or Mr. Cannon?
Mr. Cannon: Perhaps both of us.

The Witness: Practically, yes.

124 JOHN C. ANDERSON, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. Cannon:

Q. State your occupation and residence.
A. I am a photographer and am at the present time residing at Otisville, New York.
Q. Did you at one time, live at Suffern, New York?
A. Yes.
Q. When was that?
A. Up until October, 1913.
Q. You were subpœnaed by the defendant to come down here on this trial, were you not?

A. I was.

Q. I show you this photograph, Plaintiff's Exhibit No. 2, and I ask you if you made it?

A. (The witness examines the paper handed him by counsel.) I took that photo.

Q. You did?

A. Yes, sir.

Q. Did you write the memorandum on the back of that photograph?

A. Yes, sir.

Q. Does that memorandum refresh your recollection as to the place from which that picture was taken?

A. Yes.

Q. Where was that camera standing when you took that picture?

A. At the left-hand side of the highway, looking west, or north, between the wagon road and the crossing, the Harverstraw crossing I would call it, facing the public school building.

Q. How many feet from the crossing was your camera?

A. Seventy-two feet, I marked on there at the time (indicating the back of the photograph).

Q. Seventy-two feet south of the crossing?

A. Yes.

Q. Whom did you make the photograph for, Mr. Anderson?

A. I made it for Mr. Waldron, that gentleman sitting over there (indicating).

125 Cross-examination by Mr. Smyth:

Q. That road, as it crosses the track, crosses it at right angles, doesn't it, the part that goes across the track, isn't it at right angles with the track?

A. Yes, sir. Here is the highway and this is the road leading between the crossing and the highway opposite the old church.

Q. I know that. That is very interesting.

The Court: Strike out everything but "yes."

Q. The part that goes across the track is at right angles with the track?

A. Yes.

By Mr. Cannon:

Q. Your camera was practically at the foot of this embankment, wasn't it?

A. No, sir, it was at the left-hand side of the highway, about the wagon track.

Q. Going toward what?

A. Going toward the crossing from the south side.

By Mr. Smyth:

Q. In the wagon track?

A. At the side, at the left-hand side of the highway.

TURNER F. LOUGHBOROUGH, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Will you please state your occupation and your state of residence?

A. At the present time.

Q. At the present time, yes, sir?

A. Dogully, West Virginia; Civil Engineer.

126 Q. How long have you been a civil engineer?

A. About twelve years.

Q. You are at present employed in the south, are you?

A. Yes.

Q. West Virginia?

A. Yes, sir.

Q. At one time you were employed by the Erie Railroad, weren't you?

A. Yes, sir.

Q. When was that, about how long ago?

A. That was about six years ago.

Q. After that employment did you operate on your own account?

A. Yes, I was in business for myself then.

(A sketch was produced by Defendant's counsel.)

Mr. Smyth: When was it made?

Mr. Cannon: April 29th, 1909.

Mr. Smyth: Put it in evidence, you don't have to spend time to have him swear to it.

Mr. Cannon: I offer it in evidence.

Q. This is a correct map of the crossing?

A. Yes.

Q. And the road and the tracks at the so-called Haverstraw road crossing, at Sloatsburg, New York?

A. Yes.

Mr. Cannon: I offer that in evidence.

Received in evidence and marked Defendant's Exhibit G.

Q. The track at this point runs in what direction, generally?

A. They run practically north and south.

Q. The crossing known as the Haverstraw crossing, runs in what direction?

A. Northeasterly. It runs kind of diagonally across the track, but practically east and west.

Q. You have shown the crossing here, have you?

A. Yes.

Q. And part of the road to the south?

A. Yes.

127 Q. You have got a red cross here—"point of accident," that is what you understood to be the point of accident?

A. Yes, that is what I understood. I had no way to tell.

Q. You were not there at the time of the accident?

A. No, I had nothing to do with it.
Q. That red mark is at the crossing of the east side of the track?
A. Yes.
Q. Mr. Loughborough, did you on the day these measurements were made, did you make certain observations of the highway south or west of the track towards the west?
A. Yes.
Q. From the south or west side of the track, towards the north or west?
A. Yes.
Q. Those views made by you were on the side of the track opposite the building, were they not?
A. Opposite the building.
Q. Yes?
A. It was opposite the school house. I remember there was a school house on the opposite side of the track.
Q. And your observations were made where?
A. My observations were made on the opposite side there.
Q. When was it you made the observations?
A. The observations were probably made about the 27th.
Q. Of what?
A. Of April.
Q. What year?
A. 1909. The map was made on the 29th and the survey was probably made about two days before that.
Q. Have you your notes here?
A. No, I have not.
Q. What was the first observation you made of the extent of view towards the north or west on the side of the crossing which you have stated.

By Mr. Smyth:

Q. Are you speaking from your recollection?
A. No, I am not. I am speaking from the record.

128 Mr. Smyth: I do not see how he can do it.
The Witness: At ten feet——

Mr. Smyth: I object. He is not speaking from recollection.

By the Court:

Q. You are speaking from the record?
A. I am speaking from the observation I took that day and recorded.
Q. From your memory of them?
A. No, not my memory, no.
Q. Do you mean to say you don't remember them?
A. I don't remember. It is four or five years ago. I don't remember that far back. I do remember that I put them on here. I recorded them here just as I took them on the ground.
Q. You recorded them on the map?

A. Yes, I recorded them on the map just as I took them on the ground.

The Court: Objection overruled.

Mr. Smyth: Exception.

Q. What was the first observation you made of the extent of view towards the north or west on the side of the cross-examination which you have stated?

A. At ten feet from the rail of the east bound track.

By the Court:

Q. Which rail?

A. We all speak of it as the south rail.

By Mr. Cannon:

Q. That is the rail nearest to you?

A. Yes, nearest. The observation was 2,500 feet.

Q. 2,500 feet was the extent of the view?

A. At ten feet from the rail.

129 Q. What was the next observation you made?

A. The next observation was at twenty feet from the rail. That was the same. It was twenty-five hundred feet.

Q. From the south rail of the east bound track, going to the twenty foot point where you took the observation, was the view all the same along that distance?

A. It was. It was all the same from the rail to twenty feet.

Q. To the twenty feet?

A. Yes, it was a clear view for that distance of twenty feet.

Q. That view you refer to was a view of the east bound track towards Buffalo or Port Jervis?

A. Yes.

Q. What was the next position you took and observation made?

A. The next was at thirty feet. That was an observation of 805 feet.

Q. At 805 feet is what?

A. There was a sight of 805 feet at thirty feet from the rail.

Q. By sight, you mean the extent of view?

A. The extent of view up the east bound track towards Buffalo.

Q. Did you take any view between the twenty foot and the thirty foot point?

A. No, I did not.

Q. What was the next one shown there?

A. The next is at forty feet from the rail and that is a view of 540 feet.

Q. What is the next one, if you have any more?

A. The next at fifty feet, a view of 400 feet.

Q. And the next one?

A. At sixty feet, is a view of 320 feet.

Q. And the next one?

A. At seventy-five feet, is a view of 275 feet.

Q. Have you any more?

A. At 100 feet it is a view of 225 feet.

Q. From what point in the highway did you take these observations?

A. From practically the center of the highway.

130 Q. As you were going along this highway, approaching the tracks would you go in a general diagonal direction in approaching the track?

A. In approaching the track, yes.

Q. Where is the highway shown there on the south or west of the track, the Haverstraw road?

A. Within the dotted line (indicating).

Q. The continuation of the dotted lines on the other side of the track is a continuation of the road?

A. Yes.

Q. You took no other observation?

A. None, except what is shown on there.

Q. What was the width of the track, the east bound track at that point?

A. Between the rails?

Q. Between rails?

A. Four feet eight and one-half inches.

Q. This map is drawn to a scale, is it not?

A. Yes.

Q. Scale is shown here, I suppose?

A. Twenty feet to the inch.

Cross-examination by Mr. Smyth:

Q. Do you know what the overhang of the train is, as they go along on the rails?

A. Not much.

Q. It is about two feet, isn't it?

A. I don't know.

Q. Haven't you got any idea?

A. No, I never noticed.

Mr. Cannon: Just about two feet.

Mr. Smyth: Two feet, two and one-quarter inches—it is conceded that the overhang of the train going along overhanging the rail is two feet two and one-half inches.

Q. Now, the photographer, Anderson, who took Plaintiff's

131 Exhibit No. 2 states that you could only see up the crossing seventy-two feet back from the rail, sixty-three feet.

Mr. Cannon: Did he say that?

Mr. Smyth: You used that. You said it yourself, I think.

Q. On Plaintiff's Exhibit No. 2, it appears in the handwriting of Mr. Anderson that approaching the crossing seventy-two feet from the crossing up the track sixty-three feet—you make it seventy-five feet back 275 feet. That is quite a wide discrepancy between you and the photographer, isn't it?

A. There seems to be, yes.

Q. Nearly five to one?

Mr. Cannon: I think in fairness to the witness he should be shown the photograph.

The Court: My recollection is that this photograph was taken on the left-hand wheel rut?

Mr. Smyth: Yes.

The Court: This witness testified his observations were taken from the middle of the road.

Q. Of course your observations as to how far you could see, apply to a clear day?

A. No, it does not.

Q. What does it apply to?

A. A very snowy day, the day the observations were taken.

Q. Even a snowy day, that is quite a difference from a fog?

A. I don't know the conditions that morning at all. I only know when I took the observations.

Q. Were you familiar with that locality?

A. Not very, no, sir.

Q. You don't know what the physical conditions are there in the morning?

A. No, I do not.

Q. In the spring time?

A. No.

132 Q. When the frost is coming out of the ground there is more apt to be fog in the morning, than there is other times in the year, isn't that so?

A. I don't know; I didn't pay any attention to that.

MATTHEW G. BECKER, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. What is your business?

A. I am conductor on the Erie Railroad.

Q. You live where?

A. Hornell.

Q. You have been employed by the Erie Railroad for a number of years?

A. Yes.

Q. How many?

A. Forty-four.

Q. Forty-four years?

A. Yes, sir.

Q. Mr. Becker, on March 3rd, 1909, were you a conductor on train forty-eight?

A. I was.

Q. You took your train where?

A. Hornell.

Q. And ran with it to where?

A. Jersey City.

Q. Can you state generally just about what the train consisted of?
A. Yes, sir.
Q. You may, please?
A. It had three express cars, a baggage car and a mail car, two coaches and two Pullmans.

By Mr. Smyth:

Q. Nine cars?
A. No, eight cars, isn't it? There should be two express cars instead of three. Make it two express cars.

133 By Mr. Cannon:

Q. As the train was coming into Sloatsburg, New York, or thereabouts, where were you?
A. I was in the ladies' coach.

By Mr. Smyth:

Q. Which car would that be?
A. That would be the sixth car from the engine.

By Mr. Cannon:

Q. When did you first learn that there had something happened at this place?
A. When the brakes went to the emergency and the train came to a standstill without going off.
Q. I suppose you did not observe anything, with respect to the engine bell or whistle, did you?
A. At that time?
Q. As you were going across the crossing?
A. No, I did not. It blows at the crossing, so I could not say whether it did or not.

By Mr. Smyth:

Q. You could not say whether it blew at the crossing or not?
A. No, it was unobserved by me. I could not swear to it.

By Mr. Cannon:

Q. I suppose you were not paying any attention to the signals?
A. That is it exactly.
Q. About where did the train stop?
A. The engine was just past the door and the rear end was a short distance from that crossing back there. The engine was just nicely past the depot, that is east of the depot, just barely past the depot.
Q. Did you get out?
A. Yes, sir.
134 Q. What did you do?
A. Started toward the engine on the south side of the train, and met the engineer, Mr. Hector.
Q. Then what did you do?

A. He told me he had struck something and he turned right around and went right back to the crossing.

By Mr. Smyth:

Q. The engineer told you that?
A. Yes.

By Mr. Cannon:

Q. How long did you stay at the crossing?
A. How long did I stay at the crossing, did you say?
Q. Yes?
A. In the neighborhood of twenty or twenty-five minutes we were there.
Q. Who was in your train crew that day?
A. Foster and Mr. Burdick. Foster is a trainman and Burdick is the baggageman.
Q. I suppose the engineer you have already spoken of him?
A. The engineer and fireman, they are not part of the train crew; they are the engine crew.
Q. Did you observe anything with respect to the crossing bell at the crossing when you got there?
A. The crossing bell was ringing; yes, sir.
Q. There was a freight train went by, was there not?
A. Just passed; yes, sir.
Q. How long a train was that, do you remember?
A. The freight train?
Q. Yes, the freight train?
A. No, I could not say. The caboose had gone by when we came to a stop.

By Mr. Smyth:

Q. What about the caboose?
A. The caboose had passed west when we came to a stop.
Q. Out of sight, do you mean?
A. I don't know as it might have been if anyone had looked. I don't remember looking, but I remember we passed it
135 right there and the caboose had gone by our train when we came to a standstill; the freight train was west of us.

By Mr. Cannon:

Q. Did you send out your flagman?
A. Yes.
Q. Who did you send out?
A. Foster—I sent both of them out, each way.
Q. You mean ahead and behind?
A. Ahead and behind; yes, sir.
Q. Who went ahead?
A. Burdick.
Q. Who went behind?
A. Burdick, the baggageman.

Q. Who went behind, I ask you?
A. Foster.

Cross-examination by Mr. Smyth:

Q. The freight train, the caboose of the freight train had already passed you before the train came to a stop?
A. Yes, sir.
Q. Then you noticed the freight train before?
A. We were passing the freight train right there.
Q. You remember passing a freight train right where?
A. Right there. We had just passed it so that the hind end of the freight train was past us when I got off the train.
Q. Had it just passed you when you got off the train?
A. Not more than two or three minutes, a couple of minutes, maybe, it had just passed.
Q. A couple of minutes in railroading make a tremendous difference?
A. Sometimes.
Q. The freight train was out of sight then when you got off the train?
A. No, the freight train was not out of sight. It could not have got out of sight.
Q. How far west was the freight train when you got off your train?
A. I could not say.
136 Q. Was it a mile west?
A. I don't think so. I was not paying attention to the freight train. Of course I was paying attention to something else when the engineer told me he had struck somebody so without measuring the distance I knew we had just passed a freight train.
Q. You knew you had passed one?
A. Yes.
Q. When you got to the crossing the freight train was not in sight any more?
A. I could not say as to that. I should not think so.
Q. What time was it when your train came to a stop?
A. Five-forty.
Q. You took the time, did you?
A. Yes.
Q. What was the regular time for the train to pass Sloatsburg?
A. I don't remember now what time, about five thirty-five, I think.
Q. About five thirty-five?
A. I think we were in something in the neighborhood of five minutes late, or something like that. I know we left Port Jervis five minutes late. I judge by that.
Q. Where do you make up time?
A. Wherever we can.
Q. Coming down out of those mountains is a pretty good place?
A. We don't run there like that. There are speed limits at certain places all along the division, at certain places, so we are restricted to a certain speed.

Q. When you were going through a place like Paterson or Passaic, of course——

A. All along the division.

Q. Where did this train come from, by the way?

A. Where was it made up?

Q. Yes?

A. Hornell.

Q. That was where it was made up?

A. Yes.

Q. Then it was not a Buffalo express?

A. No, sir.

137 By Mr. Cannon:

Q. On the same track as the Buffalo express is run?

A. Well, yes; they come in from the Buffalo. We have a Buffalo connection, I think.

By Mr. Smyth:

Q. Did you notice the crossing bell was ringing when you got there?

A. Yes.

Q. What made you notice it?

A. Well, these things have to be reported when we get in.

Q. When did you report about the crossing bell?

A. We reported it ringing.

Q. Why did you report it, because it was out of order?

A. No, sir; I reported it ringing. I did not suppose they could ring when they were out of order.

Q. If the contact just jammed then it will ring until it is fixed?

A. I don't suppose it would ring at all.

Q. Didn't you know that what makes it ring is the train going over a contact point?

A. Yes, I understand that, but when it is out of order——

Q. But when that contact point gets jammed so it does not open the circuit, it will keep on ringing, you know that?

A. I don't know it. I did not suppose the bell would ring when it was out of order. I supposed it would stop ringing, when you went over this circuit it would not ring at all.

Q. That is the trouble with electricity, it does the reverse thing?

A. I never heard of such a thing before.

By Mr. Cannon:

Q. You are not an electrician, are you?

A. No, sir.

138 By Mr. Smyth:

Q. It was ringing all the time you were there?

A. Yes.

Q. You were there twenty-five minutes?

A. In that neighborhood, yes.

By the Court:

Q. You say the engineer told you he had struck something?
A. Yes.
Q. Then later you say he stated that he had struck somebody?
A. No, he said he had struck something. That is all he told me about it, and I went back to the crossing to see what was struck.
Q. He did not tell you what was struck?
A. No.

By Mr. Smyth:

Q. Did he tell you the thing all happened so quickly he did not see what it was?
A. No, he did not stop for any conversation.
Q. He just said he had struck something?
A. That is all he said, that he had struck something. We went then to see the trouble. We turned around and I could see one of the horses standing on the westbound track, the other one was dead.
Q. When you got up there?
A. Yes, sir; he was in sight when I turned around and looked. I could see him.
Q. Did you see a sign on the railroad post about the bell?
A. No, I did not.

Mr. Cannon: I object to that.

Q. You did not notice that?
A. No, sir.
Q. In your report of the accident, you reported this bell?
A. Yes.
Q. That is, you reported the bell as ringing, is that what you reported?
A. Yes.

139 CLARK P. BURDICK, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Will you state, please, your occupation and place of residence?
A. I am train baggage agent, living in Rochester, New York.

By Mr. Smyth:

Q. You are a train baggage agent?
A. Yes.
Q. Of the Erie Railroad?
A. Yes.

By Mr. Cannon:

Q. You were baggage agent in 1909?
A. Yes.
Q. Were you on train 48 on the morning of March 3rd, 1909?
A. Yes.

Q. You were in the crew of Conductor Becker, were you not?
A. Yes.
Q. You had come from what point?
A. Hornell.
Q. On that morning do you recall your train stopping at Sloatsburg?
A. Yes.
Q. You do?
A. Yes.
Q. Where did it stop and how?
A. It stopped, the rear end I think, the rear end of the train about six or seven hundred feet east of the crossing, this way (indicating).

By Mr. Smyth:

Q. Six or seven hundred feet east of the crossing?
A. Yes, I should think about that.

Mr. Smyth: What is the length of one of those cars, is it sixty feet?
Mr. Cannon: Sixty-four feet.
Mr. Smyth: It is conceded that each of these cars is about sixty to sixty-four feet long.

140 The Witness: That is about what I should think. But of course I don't know exactly, but I should estimate it about that.

Q. And the engine, how long is the engine, the tender and engine?
A. I should think that engine was about sixty feet; I don't know, but I should think so.
Q. Then it would be nine times sixty feet to get the length of the train?
A. Yes, sir.

By Mr. Cannon:

Q. You were in the baggage car were you not?
A. Yes.
Q. Where was that car when you got out?
A. I got out of the coach.
Q. Where was the head end of the train with respect to the station?
A. The end of the engine?
Q. What?
A. The engine—where it stood?
Q. Yes?
A. Just east of the station, as near as I can recollect. I should think just east of the station.
Q. You did get out of the train, didn't you?
A. Yes.
Q. What did you do?
A. I walked back north to the rear end or somewhere about there and the conductor told me to take a flag and go down and notify the train approaching, the one that was at the tank.

Mr. Smyth: What?

The Witness: There was a train near the tank and I should judge the tank was probably a thousand feet east of the station, maybe twelve hundred. To go down there and notify the engineer that there was an accident there and to proceed carefully or words to that effect, and I did so.

Q. That is, you got out with a flag and went forward?

A. Yes.

Q. Went ahead of your train?

A. Yes.

141 Q. You saw this freight train down near the tank?

A. Yes.

Q. Who was the engineer?

A. I have forgotten his name.

Q. Is he in court?

A. Yes, sir.

Mr. Cannon: Will the engineer of second 75 please arise?

Q. Is that the engineer of the train (indicating the man who stands up)?

A. Yes.

Q. Had you noticed at some time as you were going through Sloatsburg, that you passed a freight train on the west bound track?

A. No.

Q. You did not observe it?

A. I did not observe it.

Q. Were you in your baggage compartment at the time?

A. Yes, sir, in the baggage.

Q. What train was this, towards the east, that you went to notify the engineer of?

A. Second 75.

Q. That was standing at the time, wasn't it when you got there?

A. No, it was moving away; just starting from the tank.

Q. Did it proceed from the tank?

A. Yes.

Q. It kept on going?

A. Yes.

Q. At what sort of a speed?

A. About three or four or five miles an hour as near as I can recollect.

Q. How long did you stay ahead of your train?

A. I rode right back up, and from there—I think he stopped nearly to our engine—he pulled up nearly to our engine and stopped.

Q. You rode up on second 75 to your train?

A. Yes.

Q. You got off and what did you do then?

A. Went to the train; our train.

Q. You did not go back to the crossing at all as I understand it?

A. No; I did not get clear to the crossing.

14 Q. How long before your train started after you got back, about?

A. I should judge about ten minutes.

Cross-examination by Mr. Smith:

Q. What time does that train leave Hornell?
A. It left there at eight o'clock, I should think, at night.
Q. Eight o'clock at night?
A. Yes.
Q. Delays are usual at night, are they not?
A. Delays?
Q. Yes; where there are delays?
A. Yes, sir.
Q. The train comes into Jersey City at what time in the morning, with the Pullman sleepers?
A. 7:12, I think at that time.
Q. The time that they make up speed is toward morning, towards the end of the trip, isn't it?

Mr. Cannon: I object to that as incompetent and immaterial.
The Court: Overruled.
Mr. Cannon: Exception.

Q. Is that right, Mr. Burdick?
A. (No response from the witness.)

By the Court:

Q. Do you understand the question?
A. No.

The Court: Let the stenographer repeat it.
(Question repeated by stenographer as follows): "Q. The time that they make up speed is toward morning, towards the end of the trip?"

The Witness: That I can't say.

Q. Do you know?
A. No, I don't.

By Mr. Smyth:

Q. Do you recollect how you were going before the emergency brakes were put on?
A. No, I do not.
143 Q. What car were you in back of the engine?
A. In the baggage car.
Q. Was that the next one?
A. The third car from the engine, I think; I mean two express cars east of my car.
Q. Did you have any talk with the engineer right after the accident when you got off the train?
A. Our engineer?
Q. Yes?
A. No, I don't think I did.

By Mr. Cannon:

Q. Mr. Burdick, did you observe anything with respect to the engine bell at any time while you were there?

A. No, I did not notice.

By Mr. Smyth:

Q. Nor the whistle?
A. No, I did not.
Q. You heard the emergency whistle when you put the brakes on?
A. Yes, I felt that.
Q. When you felt the brake and then you heard the emergency whistle——
A. We have no emergency whistle.
Q. You heard as the engine brakes were put on, you hear the whistle?
A. I did not hear no whistle.
Q. You did not hear any whistle at any time?
A. No; all I know or felt was the brakes going into emergency.
Q. Then you know no whistle was blown?
A. I don't know. I was busy at my work in there.

By Mr. Cannon:

Q. What was your work?
A. I was at that time fixing up my baggage and stuff coming to New York.
Q. Were you giving any attention to bells or whistles?
A. No, sir.
Q. As you went through Sloatsburg?
A. No.

144 By the Court:

Q. Was there any change of engineers between Hornell at eight o'clock in the evening and this point at six o'clock in the morning?
A. Had the engineer changed?
Q. Yes?
A. We had this man at Port Jervis. We used to change at Susquehanna and Port Jervis.

WILLIAM H. HECTOR, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. What is your occupation? And your residence?
A. I am a locomotive engineer.
Q. Where do you live?
A. In Port Jervis, New York.
Q. By whom are you employed?
A. The Erie Railroad Company.
Q. For how long have you been employed by the Erie Railroad Company?
A. I began in 1879. I have been there about thirty-eight years.
Q. How old are you?

A. I will be sixty-two years of age my next birthday, and I am past sixty-one.

Q. Were you engineer of train 48 on the morning of March 3rd, 1909?

A. I was; yes, sir.

Q. Where did you take that train?

A. Where did I take the train?

Q. Yes?

A. I took the train at Port Jervis.

Q. You were the engineer of that train?

A. I was; yes, sir.

Q. Do you recall approaching the Village of Sloatsburg on that morning?

A. I do; yes, sir.

145 Q. State what you did if anything with respect*ing* to sounding engine bell or whistle, as you went through Sloatsburg?

A. On approaching the crossing at Sloatsburg we have, if you understand——

Q. No; not what I understand?

A. In approaching the crossing I issued the crossing whistle.

Q. There were crossings up there?

A. Yes; after we leave the crossing at the white store, there are three crossings right along in line, one after the other.

Q. On this morning as you were operating that engine, what did you do in approaching this crossing in respect to sounding signals?

A. I sounded the crossing whistle west of Sloatsburg, approaching Sloatsburg crossing, west.

Q. That signal consisted of what?

A. It signified that I was approaching that crossing.

Q. I mean what was the nature of the signal?

A. Two long and two short blasts of the whistle.

Q. About where did you sound that signal?

A. Just west of the crossing there is a post located there with a letter W on it which indicates for the engineer to sound his whistle.

By Mr. Smyth:

Q. You call it a whistling post?

A. A whistling post.

By Mr. Cannon:

Q. The signal was two long and two short blasts?

A. Yes, sir; for that crossing.

Q. Where was that whistle post with respect to the Haverstraw crossing road?

A. There is one crossing between the Haverstraw crossing and this whistling post.

Q. At that whistling post you began to start your whistling; is that it?

A. I did, sir, whistle.

146 Q. You sounded it as you were going along?

A. Yes; we blow two long and two short blasts and then we let up.

Q. When you say a long blast, you hold your whistle down?
A. There is variation, you know, our instruction book——
Q. I am asking you what you did this morning?
A. We blow two long blasts of the whistle and two short blasts.
Q. What did you do, if anything, with respect to your engine bell as you were going through Sloatsburg on this morning?
A. Our engine bell was started west of the white store crossing.
Q. You say it was started. How was it started?
A. It rings automatically by a bell ringer placed on the engine and it rings by air.
Q. Did you have that in your control?
A. I did; yes, sir.
Q. To ring that bell, what did you do?
A. I opened a valve that admitted the air into the cylinder of the bell ringer and causes it to work automatically.
Q. Does that continue until you shut it off?
A. It does; yes, sir.
Q. This engine did not have one of the old fashioned bells with a rope on it which you pull?
A. It was a rope connected with the crank on the arch that is over the bell. We have a rope connected with that crank so if our bell ringer should give out, we have something to ring the bell with.
Q. You started this bell where?
A. West of the white store crossing.
Q. White store crossing is where with respect to the Haverstraw crossing?
A. I don't understand.
Q. Is it the first crossing west of it?
A. No; it is the second crossing west of Haverstraw.
Q. How far from the Haverstraw crossing is the white store crossing?
A. I should judge it was between a quarter and a half a mile.
147 Q. Did the bell continue to ring as you went through Sloatsburg?
A. Yes, sir.
Q. What happened at the Haverstraw crossing that morning?
A. Well, sir, I struck a wagon.
Q. You mean your engine did?
A. The engine, yes, sir. Exactly so. It struck the front wheels as near as I could tell of the wagon.
Q. What did you do?
A. I stopped the train just as quick as I possibly could.
Q. What brakes did you put on?
A. The emergency brakes.
Q. Your train, as has been testified, consisted of an engine and eight cars or do you recall?
A. Well, sir, I am not familiar enough with the number of cars that we have in a train.
Q. In other words, you don't remember now, I suppose?

A. Yes; I understand we had eight cars.
Q. Where was the engine when it was brought to a stop?
A. Just east of Sloatsburg Station.
Q. Did you get off the engine?
A. I did, sir.
Q. After the accident?
A. Right away.
Q. What did you do?
A. I started back and notified our conductor.
Q. You did notify him?
A. I did; yes, sir.
Q. Did Mr. Burdick go out ahead of your engine?
A. I believe that he did.
Q. After your train came to a stop was your engine bell still ringing?
A. It was; yes, sir.
Q. Did you shut it off?
A. No; I got off and left it ringing. The fireman shut the bell off. I got off as quick as I could and started back.
Q. When you came back was the bell ringing or not?
A. The fireman had shut the bell ringer off.

By the Court:

Q. Do you refer to the bell on the locomotive?
A. Yes; the engine bell.

148 By Mr. Cannon:

Q. Now, besides this crossing whistle, two long and two short blasts, did you blow any other whistle as you approached the Haverstraw road?
A. I did, sir, the station whistle, one long blast of the whistle.
Q. Where did you begin sounding that?
A. Just about the time I passed over the first crossing west of the Haverstraw crossing.
Q. About how far away from the Haverstraw crossing, was that crossing that you refer to?
A. I don't know that I could just exactly tell you the difference. It is not very far.
Q. Could you estimate it, do you think?
A. Possibly it might be—well, I should hate to give an estimate of it, under the circumstances in which I am placed—I should judge it was fully five hundred feet or about that.

By Mr. Smyth:

Q. From the Haverstraw crossing?
A. Yes; between the two; it might not be quite as much as that. It might be a little more.

By Mr. Cannon:

Q. What kind of a whistle was this station whistle?
A. One long blast of the whistle.

Q. With respect to the station whistle, when did you sound that station whistle?
A. I sounded that approaching the station.
Q. Was it after or before the crossing whistle?
A. It was after the crossing whistle.
Q. You first sounded the crossing whistle.
A. Yes.
Q. Of two long and two short blasts?
A. Yes.
Q. Then going along after that, you sounded the long blast, the station whistle?
A. Yes, sir.

149 Cross-examination by Mr. Smyth:

Q. What time did you get on the train?
A. At Port Jervis?
Q. Yes?
A. It was about 4:10.
Q. What run into Port Jervis did you have?
A. I was running at that time 48 and No. 3 was my west bound run.
Q. The train you were on before you got on 48 on the morning of this accident?
A. Before I got on the No. 48?
Q. Yes?
A. I was not on any other train. Port Jervis is our terminal, the division terminal.
Q. When did you get into Port Jervis?
A. I went up that same night on No. 3 after getting into Jersey City, and I leave Port Jervis in the morning and then come back in the afternoon with Train 3. That was the run I had at that time.
Q. When do you get back to Port Jervis?
A. At 5:32 in the afternoon.
Q 5:32 in the afternoon?
A. Yes.
Q. Do you lay off between 5:32 and the next morning?
A. At 4:10; yes, sir.
Q. At 4:10?
A. Yes, sir.
Q. You are still employed, of course, by the Erie Railroad?
A. Yes.
Q. Have you got the same train?
A. No, sir.
Q. You say you brought your train to a stop as quickly as possible?
A. I did.
Q. You say you put on the emergency brake?
A. Yes, sir.
Q. Was that at the instant of hitting the vehicle or right after hitting the vehicle?

A. It came so quickly that it seemed almost all together, just as soon as I saw it, I put the emergency brake right on.

Q. The accident happened as you put the emergency brake on?

A. I applied it just about the time that I saw the wagon.

150 Q. I understand; I am asking you did you put your emergency brake on at the instant of striking the wagon?

A. No, I put it on just before.

Q. What part of the wagon was over the tracks when you put the emergency brake on?

A. The front wheels of the wagon, just the front wheels.

Q. The front wheels of the wagon were between the rails when you put the emergency brake on; is that right?

A. I should judge it was nearly—the front wheels might not have been quite to the center, but I judge so.

Q. When you put the emergency brake on, is that so——

A. No, when I struck the wagon.

Q. I am trying to find out from you where were the wheels of the wagon when you put the emergency brake on?

A. That I would be unable to determine, my good man, just where the wheels were when I put the emergency brake on. If this man was in motion, you see, his wheels would be moving.

Q. The wheels of the wagon were over the rail when you put the emergency brake on, weren't they?

A. I hardly think they were over the rail for the man was just going on the track, but when I struck the man, I struck the front wheels.

Q. I understand it thoroughly?

A. Then I can make it no plainer.

Q. You can make it plain where the wagon was when you put the emergency brake on; is it so that you can not say whether the wheels were just on the rail or just beyond the rail?

A. Going on to the track when I put the emergency brake on.

Q. The wheels of the wagon?

A. Yes.

Q. The wheels of the wagon were going on to the track when you put the emergency brake on; is that right?

A. They were going on the track; yes, sir.

151 Q. They were going on the track; is that right?

A. Yes, sir; I struck them on the track.

By Juror No. 1:

Q. Between the two rails?

A. Well, I struck it so that it glanced a little bit.

Q. Were the wheels of the wagon between the two rails when you put on the emergency brake?

A. No, sir; they were just going on, my good man, and when I struck it, not when I put on the emergency brake.

By Mr. Smyth:

Q. Well, where were the wheels of the wagon when you put on the emergency brake? (No response by the witness.)

By the Court:

Q. Are you able to say?
A. I am able to say.
Q. Well, say it?
A. They were driving on to the track.
Q. Just at the instant when you put on your emergency brake, where were the front wheels of the wagon?
A. They were just approaching the rails.
Q. What spot?
A. Right near the rails.

By Mr. Smyth:

Q. Within an inch?
A. I could not determine that.
Q. Is that as close as you can get?
A. It would be pretty hard for any living man to determine.
Q. You put the emergency brake on just as soon as you saw this wagon, didn't you?
A. I did; yes, sir.
Q. Just as soon as you saw this wagon?
A. Yes.
Q. You did not see this wagon until just as the wheels were going on the track; that is right, isn't it?
A. Well——
Q. Answer my question, yes or no, because it is a perfectly plain question?

152 Mr. Cannon: In fairness to the witness, let him explain.

The Court: The witness will answer the question yes or no when he can.

(Question repeated by the stenographer as follows): "You did not see this wagon until just as the wheels were going on the track; that is right, isn't it, yes or no?"

A. Yes, sir; that is right; just when they were going on.
Q. You were looking ahead of you, weren't you?
A. Yes, sir.
Q. All the time?
A. Yes, sir.
Q. At this time when you first saw the wagon, when the wheels were just going on the track, did you see the man at all?
A. I did not see the man; no, sir.
Q. You did not see the wagon at all before you approached that place, did you, before you got to that place?
A. No, sir.
Q. You were going at that time at full speed, weren't you?
A. Well, I don't understand just exactly how—I can give you our running time.
Q. I don't want your running time, but you must, as an engineer of such long experience, be able to tell us how fast your engine was going?

A. Yes, sir; well, I was going, I should judge, between forty and forty-five miles an hour, about that.

Q. Now, you are talking of running times?

A. No, sir; I should judge I was going about that at that time, the time of the accident.

Q. You were on a slight down grade, weren't you.

A. Well, just where you hit over to this Haverstraw crossing that you speak of is on a down grade.

Q. There was a straight away track for how long a distance there?

A. It is a straight track from the depot to——

153 Q. How many miles, you must know it, you have been over it hundreds of times?

A. I should judge it was in the neighborhood of nearly three-quarters of a mile.

Q. That was one spot where you could make up some of the time you were behind, wasn't it?

A. We could make up time; yes, sir.

Q. You were behind, weren't you?

A. I think we were nearly on time.

Q. Your conductor said you left Port Jervis late and his estimate was that you were about five minutes late at Sloatsburg?

A. Well, possibly we might have been five minutes late at Sloatsburg.

Q. You were trying to make up time, weren't you?

A. I don't know that I was.

Q. How fast can you go when you try to make up time over that straight stretch of track?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

Overruled.

Mr. Cannon: Exception.

A. That depends upon the size of the wheel of the locomotive and the speed that it is built for.

Q. I am talking about that engine and that train and that place?

Mr. Cannon: Same objection.

The Court: Objection overruled.

Mr. Cannon: Exception.

Q. How fast can you go?

A. If it was put up to its highest test, I presume the engine could attain a speed of sixty-five miles an hour at that point.

Q. That is one of the new type engines, isn't it?

A. Not of the newest type, no.

Q. How new was it?

A. I don't know just when the engines were built. They

154 were a class of engines that we had there for a long time. They were in service at the time of the accident.

Q. It was one of those very large engines with very short smoke-stacks, wasn't it?

A. No, sir.

Q. What kind was it?
A. It was one of the K-1 engines, they are numbered.
Q. How long had you driven that engine?
A. Well, we have no particular engine on that road. When I came to Jersey City, possibly I would not have that engine back again on No. 3. They would use it for some other run.
Q. What is the running time of the train?
A. We left Port Jervis at 4:10. I believe our time at that time into Jersey City was 7:12 or something like that.
Q. How many stops do you make on the way?
A. I think we stopped at Middletown and at that time, Tuxedo—no, not Tuxedo—Paterson, I believe, was a conditional stop. I think at that time we went by Bergen County—Ridgewood.
Q. That is away east of Sloatsburg?
A. Yes; we stopped to let off passengers from Hornell.
Q. Between Hornell and Sloatsburg, where do you stop?
A. I couldn't tell.
Q. You don't remember?
A. I don't remember.
Q. When were you on that run last?
A. I don't go any further than Port Jervis.
Q. That is right; I mean between Port Jervis and Sloatsburg?
A. Between Port Jervis and Sloatsburg.
Q. How many stops do you make between?
A. We make those two stops and we stop for water at Harriman's. It was at that time called Turners. At the present time it is known as Harriman's.
Q. That is on the Harriman Estate?
A. Yes, sir; I suppose so.
Q. You did not take the time of your train, did you, going by mile posts there?
A. No, sir; I don't know as I did.
155 Q. You were due in Sloatsburg at 5:30 weren't you?
A. I think we were due at Tuxedo—we have no time at Sloatsburg; we have no time table time at Sloatsburg.
Q. Before you got to this crossing, is the grade down or level, that is to say, west of this crossing where the accident happened?
A. West of the crossing?
Q. Yes?
A. Well, after we crossed the crossing at the white store, there is just a little slight sag in the track and then as we approach this Haverstraw crossing there is a descending grade again, it descends down, more steep.
Q. There is a decline all the way from the white store crossing?
A. Yes.
Q. There is?
A. I should judge it was nearly level at one point from the white store, it sagged just a little and then it rises just a little as we approach the Haverstraw crossing.
Q. Do you specifically remember whistling before you came to

that crossing or is it merely because it is your habit to whistle that you think that you did it?

A. I blew the whistle.

Q. What?

A. I certainly blew the whistle for the crossing.

Q. You may say that "certainly you blew the whistle" knowing it was your habit to do so—I am asking you do you, independent of your habit of blowing it, independent of your book of rules which says to blow it, do you recollect actually blowing it?

A. I do; yes, sir.

Q. Of course, you appreciate, do you not, that if you were to admit otherwise, you would admit that it was your carelessness that caused this man's life to be snapped out?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

156 The Court: Objection sustained.

Mr. Smyth: I except. I am entitled to show that on the credibility of the witness.

The Court: You may do it in some other way.

Q. You appreciate, do you not, that the blame for this man's death is charged in this case to you?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and the question assumes facts that are not consistent with the pleadings.

By the Court:

Q. You realize that you were in control of the locomotive which killed this man?

A. I was in charge, yes, sir.

The Court: I think that covers it.

Mr. Smyth: I think that is sufficient; yes, sir.

Q. How far west of this crossing was this whistling post stationed?

A. I should judge possibly three hundred feet. It might be a little more. I could not just exactly give the exact distance. I should judge it was that.

By Mr. Smyth:

Q. Three hundred feet from which crossing?

A. From the first crossing, west of the Haverstraw road.

Q. How far west of the Haverstraw crossing whistle post, without reference to anything else?

A. I could not just exactly tell you just the distance there is between those crossings. They are close together.

Q. About twelve hundred feet?

A. I should not think it is that far.

157 Q. You know I have never been over that place?

A. I should not think so much. I should think it might be four hundred feet between the two crossings, maybe a little more, maybe five. I could not say.

Q. Then you would make it about eight hundred feet from the Haverstraw crossing?

A. I should judge fully nine hundred feet from the Haverstraw crossing.

Q. Nine hundred feet from the Haverstraw crossing?

A. I should judge that.

Q. Did you notice the freight train which passed you?

A. Yes, sir.

Q. How near to the Haverstraw crossing were you when the caboose of the freight train passed you?

A. I think the engine passed the caboose between the two crossings, between the Haverstraw crossing and the crossing west of the Haverstraw crossing.

Q. The white store crossing and the Haverstraw crossing?

A. No.

Q. Between what?

A. Between the first crossing west of the Haverstraw crossing and the Haverstraw crossing.

Q. That caboose passed you?

A. Yes, sir.

Q. How many feet from the Haverstraw crossing would that be?

A. If it was three hundred and thirty feet, it would be just about a half that distance, where I passed them, between those two crossings.

Q. Who was the fireman, by the way?

A. Samuel Kenyon.

Q. Is he in court?

A. Yes.

Q. Kenyon did not call your attention to this man or the wagon or the horse, did he?

A. No, sir.

Q. Where was he in the engine cab?

A. On the left side.

Q. So far as any warning to you is concerned, it was simply what you yourself saw; was that the first?

A. When I struck the team, yes.

158 Q. That was the first?

A. Yes. The fireman said nothing to me until after we had struck the team.

Q. You did not see anything yourself until just about the instant of striking the wagon; is that right?

A. Well——

Q. Answer yes or no. Read the question and try and understand it, and then answer yes or no?

(Question repeated by the stenographer as follows): "You did not see anything yourself until just about the instant of striking the wagon; is that right, yes or no?"

A. Just about the time I saw the wagon, I struck it.

By the Court:

Q. About how many seconds elapsed—you go over that part, or have gone over that part a great many times—about how many

seconds elapsed from the point where that whistling post was and where this accident happened?

A. I should judge it would take in the neighborhood of about thirty-five seconds or forty seconds.

Q. Thirty-five or forty seconds?

A. About that. It might take——

Q. You have answered the question now. When you have answered it, let it go?

A. Yes, sir.

Q. That is you estimate?

A. Yes, sir; I should judge about that.

By Mr. Cannon:

Q. What was the last stop before you reached Sloatsburg of your train that morning?

A. I think the train made no stops after Middletown. That is, the last stop was for water at Harriman's.

Q. Your duties in the engine cab consisted of what, in running that engine?

A. It consists of—well, I have the care of the boiler and
159 the ringing of the bell and sounding of the whistle and charge of the sand levers, and so on.

Q. Do you have charge of the brakes?

A. Yes, sir.

Q. Do you have charge of the throttle?

A. Yes, sir.

Q. You have charge of the lever which reverses?

A. Exactly.

Q. And make the engine go forward?

A. It all comes under the engineer's charge, that does.

Q. In running your train, you have to do with all those appliances, do you not?

A. Yes; when there is a shift necessary to be made.

Q. In running your train, you have to do with all of those things?

A. Yes, sir.

Q. You do not rivet your attention upon any one thing, I suppose, do you?

A. Only when it is necessary to use it.

Q. You were running your train along the track, and you were looking on the track ahead, were you not?

A. Yes, sir.

Q. I understand this whistling post referred to is west of the first crossing, west of the Haverstraw road: is that right?

A. Yes.

By Mr. Smyth:

Q. You were on the right-hand side of the cab?

A. Yes, sir.

Q. You were on the side of the cab that the wagon came toward?

A. Exactly.

Mr. Cannon: I have some documents to put in evidence at this time as the foundation for subsequent testimony which I propose to produce.

I offer in evidence the exemplified or certified copy of a document as to the appointment of P. d'Adamovitch as vice consul of
160 the Russian Government at New York City on May 8th, 1909.

Mr. Smyth: We make no objection to the form of proof, but we make the substantial objection that it is irrelevant, incompetent and immaterial.

Mr. Cannon: This goes to the question of the settlement made by the Russian Consul with the defendant.

The Court: The money was paid to this individual?

Mr. Cannon: Yes, and he has receipted for the money.

The Court: Will there be a rebuttal attacking the alleged settlement?

Mr. Smyth: I don't think on the facts Mr. Cannon has——

Mr. Cannon: This proof which I have is all documentary.

The Court: It will be received for the purpose of enabling you to prove the fact of the alleged defense.

Mr. Smyth: Your Honor will note my exception.

Received in evidence and marked Defendant's Exhibit H.

Mr. Cannon: I offer in evidence a receipt or receipted voucher dated October, 1909, signed by the Russian Imperial Consul General of New York, by P. d'Adamovitch, vice consul.

Mr. Smyth: We make the same objection not as to the form of the proof, not on the ground it is incompetent proof, but that it is incompetent to the issues here.

The Court: Objection overruled. I understand your objection is to everything except the form of the proof?

Mr. Smyth: That is it.

161 Objection overruled.

Mr. Smyth: Exception.

Mr. Cannon: You make no objection on the ground the signature is not that of P. d'Adamovitch, vice consul of the Russian Government at New York, at this time?

Mr. Smyth: That is right.

Received in evidence and marked Defendant's Exhibit I.

Mr. Cannon: I offer in evidence a document signed by the Imperial Russian Consul of New York, by P. d'Adamovitch, vice consul, dated October 6th, 1909.

Mr. Smyth: Same objection.

Objection overruled.

Mr. Smyth: Exception.

I object to it on the further ground that there is no authority shown for the Russian Consul to execute this paper on behalf of either widow or children or next of kin of the deceased.

Mr. Cannon: Of course, upon that question we rely upon the treaty. It is wholly a question of law.

Mr. Smyth: That covers it. Does your Honor overrule the objection?

The Court: Yes.
Mr. Smyth: Exception.

Received in evidence and marked Defendant's Exhibit J.

Mr. Cannon: It is conceded that the Imperial Russian Consul-General did have in 1909 territorial jurisdiction throughout the State of New York.

Mr. Smyth: That concession is made subject to my objection as to the evidence being irrelevant, incompetent and immaterial. Does your Honor admit the concession in evidence?

The Court: Yes.

162 Mr. Smyth: Exception.

Mr. Cannon: It is also conceded that before and at the time of the granting of letters of administration to the plaintiff in this case by the Surrogate's Court of Rockland County, New York, no citation was served upon or waiver obtained from the Imperial Russian Consul-General at New York?

Mr. Smyth: That concession is made with the same limitation. Does your Honor receive that in evidence?

The Court: Yes.

Mr. Smyth: Exception.

Mr. Cannon: I wish to recall Mr. Loughborough, the civil engineer, for one or two questions.

The Court: Yes.

TURNER F. LOUGHBOROUGH, recalled in behalf of the defendant, testified as follows:

Direct examination by Mr. Cannon:

Q. At the time you made these measurements at the Haverstraw crossing at Sloatsburg in the month of April, 1909, did you make certain measurements with respect to the elevation of the embankment south or west of the track, and on the left-hand side as you approached the east bound track?

A. I did.

Q. Did you make a profile showing that elevation?

A. Just to the top of the bank.

Q. That profile is shown upon this map, Defendant's Exhibit G?

A. It is.

Q. Have you your scale here?

A. Yes.

Q. The outline of the embankment is shown in what color?

A. That is shown in green.

163 Q. The lower edge of the bank alongside of the railroad track is on the average about how far from the outer rail of the east bound track—first I might limit it to near the crossing. How near is the bottom of the bank from the outside rail of the east bound track?

A. It is about twenty feet opposite the crossing.

Q. Opposite the crossing?

A. Opposite the crossing, it is about twenty feet.

Q. You are referring now to the bottom of the embankment?
A. The bottom of it, yes, sir.
Q. Was there a ditch there between the track and the bottom of the embankment?
A. There is, yes, sir.
Q. The usual ditch alongside the railroad track?
A. Yes; practically a standard ditch.
Q. You have a profile shown upon that map, have you not?
A. Yes.
Q. That profile is what?
A. The profile is of the top of the bank.
Q. Running in what direction?
A. Parallel to the track.
Q. Beginning at the Haverstraw highway?
A. Yes, sir.
Q. And running back how far?
A. It runs back about 675 feet, approximately.
Q. That is the extent of your profile?
A. Yes, sir.
Q. The top of that embankment is shown on that profile by what colored line?
A. Black line.
Q. That is the diagram at the bottom of that map (indicating)?
A. Yes, sir.
Q. Will you explain what that line indicates?
A. It is the elevation of the top of the bank that is parallel to the track, and really the only obstruction to the track from the highway.

Mr. Smyth: I move to strike that out as a conclusion and as not responsive.

164 Mr. Cannon: I consent to strike out "really the only obstruction to the track from the highway."

Q. That is an elevation above what?
A. Well, it is in reference to the track.
Q. In reference to the track?
A. Yes, sir.
Q. Will you explain how that black line indicates the extent of the elevation upon that profile?
A. You mean in height?
Q. Yes, in height?
A. Do you want the height at different points?
Q. At the highway there is no elevation, I suppose, is there?
A. That is where I started, at the highway.
Q. Then you take an elevation where with respect to the extent of the observation?
A. The first observation I have is seventy-three feet from the junction of the two highways. That is, here is a highway coming down here and that is the main highway, and here is a crossing across the track (indicating) where I start at zero is practically at the junction of these two highways.

Q. That highway is north, as we call it here, of the embankment, is it not?

A. No; it would not be north of the embankment. It is near the end of the embankment.

Q. Is there another highway, then?

A. Yes; here is a highway coming down here. That is the main highway.

Q. That is the highway running on top of the embankment?

A. Yes.

Q. The one shown in plaintiff's photograph known as the Orange Turnpike?

A. I don't know.

Mr. Smyth: It is the state road.

The Witness: It is the state road; it is the main road.

165 By Mr. Smyth:

Q. That is the road to Tuxedo?

A. Yes.

By Mr. Cannon:

Q. Your first observation was seventy-three feet from the Haverstraw highway?

A. Yes.

Q. What was the elevation of the embankment at that point?

A. Why, it is practically three feet higher than at Zero.

Q. What is Zero?

A. Zero is the junction of those roads, the junction of the main highway which he calls the state road, and the Haverstraw crossing.

Q. What is the highest point of that embankment?

A. I only have it that distance, and it shows the extreme end of the profile. I have it here shown as the highest point. It may go higher, I don't know.

Q. Within that six hundred feet limit?

A. Yes.

Q. How high is the highest point?

A. That is about 26½ feet higher than the junction of the roads.

Q. As I understand it, the black line over those green check lines is the line indicating the depth of the embankment as it runs along towards the west from the Haverstraw crossing?

A. Yes, sir.

Q. What do these figures mean upon the right-hand side of the various green lines shown on the profile?

A. That is the vertical rise.

Q. Those figures mean what?

A. So many feet.

Q. Above what?

A. Above the junction of the road—no, not the junction of the road, because I have that started about three feet and a half above the junction of the road. I have put down the beginning point of the profile, not at Zero, but at about 3½ feet above the junction of

the road, so you have to deduct 3½ feet from the figures as shown on here.

166 Q. The junction of the road which you spoke of is higher or lower than the point directly opposite the embankment in the Haverstraw road?

A. It is, yes, sir.

Q. Which is it, higher or lower?

A. I don't remember. I think it is lower.

Q. Does your map show?

A. No, it does not.

Q. It is lower?

A. I think it is lower, yes.

Q. There is an upgrade?

A. I think it goes down and then goes up to the tracks, but that is not positive.

By Mr. Smyth:

Q. That is the way it is now. It was not that way then?

A. I don't remember, Mr. Smyth, whether it was that way or not. That is simply my recollection of it.

Q. Have you been there recently?

A. No, I have not.

Q. You don't know whether the road has been discontinued or not there, do you?

A. No, I don't.

Mr. Cannon: I object to that as irrelevant, incompetent and immaterial.

By Mr. Cannon:

Q. Let us be clear about the starting point of your measurements as to the elevation of the bank. Will you please state it again?

A. It is at the junction of the two roads, the main highway and what you call the Haverstraw road.

Q. The Zero is at the junction of these two roads here (indicating)?

A. It is practically that, yes.

Q. The outline of the embankment is enclosed in green, is it?

A. The outline is, yes, sir.

Q. This green line running along the Orange County Highway, that is the top of the embankment, isn't it?

A. Yes; the top is the furtherest line from the track. There is the top, and the nearest line is the bottom.

167 MATTHEW G. BECKER, a witness recalled in behalf of the defendant, testified as follows:

Direct examination by Mr. Cannon:

Q. You were asked on your cross-examination whether or not your train on that morning of this accident was late, and I believe you stated something with regard to that?

A. I did.

Q. Have you refreshed your recollection about it?
A. Yes; I got a train book and I thought we left five minutes late I thought our time was at Port Jervis at 4:05 and we left at 4:10 instead of 4:05, but our arriving was 4:05 and leaving time 4:10, so we were quite on time.

By Mr. Smyth:

Q. What, the Erie Railroad?
A. Yes, sir.

Mr. Cannon: I ride on it every morning, and it is right on time.

By Mr. Cannon:

Q. What is the distance between Port Jervis and Jersey City?
A. Eighty-eight miles.
Q. What was your running time at that time between those two places?
A. We left at 4:10 and arrived in Jersey City at seven o'clock.

By Mr. Smyth:

Q. This is a well travelled part of the Erie Railroad, the main line?
A. Yes.
Q. Trains run faster over the other sections of the road where the grass grows between the rails?
A. I don't know of any such sections.

168 SAMUEL KENYON, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. What is your occupation?
A. Engineer at the present time.
Q. Employed by whom?
A. The Erie Railroad.
Q. What were you in 1909?
A. Fireman.
Q. Where do you reside?
A. Port Jervis.
Q. How long have you been employed by the Erie Railroad Company?
A. Twelve years.
Q. Were you fireman of train 48 that came through Sloatsburg on the morning of March 3rd, 1909?
A. Yes, sir.
Q. You were with Mr. Hector?
A. Yes, sir.
Q. As you were approaching Sloatsburg where were you on that train?
A. The left hand side of the cab.
Q. You were in the cab of the engine on which side?
A. The left side.

Q. What were you doing there?
A. Looking ahead.
Q. Did you hear anything with respect to the engine whistle of your engine?
A. Yes, sir.
Q. What did you hear, and where did you hear it?
A. He blew the crossing whistle at the second crossing above there, where the whistling post is, and then he blew the station whistle between the two crossings.
Q. Between the two crossings—you mean what crossings?
A. The crossing where the accident happened and the one above there.
Q. When you say above there you mean in what direction?
A. West.
Q. Have you any recollection about the bell on this engine?
A. Yes, sir.
169 Q. What is it?
A. It was ringing.
Q. Do you recall where it was started?
A. I don't recall just the place it was started, no.
Q. Do you recall of its having rung after you went over the Haverstraw crossing?
A. Yes, sir.
Q. You did not see this accident, I understand?
A. No.
Q. The first you knew of it was when?
A. When I heard my engineer apply the emergency brake.
Q. Did you do anything with respect to the engine bell after the accident?
A. Yes, sir, I shut it off.
Q. Where was the engine when you shut it off?
A. Standing still below the station.
Q. That is after the train had come to a stop?
A. Yes.
Q. Was it still ringing when it came to a stop?
A. Yes.
Q. You shut it off?
A. Yes.

Cross-examination by Mr. Smyth:

Q. When the engineer put on the emergency brake he sounded the emergency whistle, didn't he?
A. No.
Q. He sounded it with a blast which you do sound when there is an accident?
A. Before that he blew the station whistle; that is all I heard.
Q. Just the instant before?
A. It had just nicely got through blowing about the time he put on the emergency brake, for the station whistle.
Q. You were looking ahead and did not see anybody?
A. No, sir.

Q. You made a report, I suppose, very shortly after the accident?
A. Yes, sir.
Q. You made a report on regular blank furnished by the road?
A. Yes, sir.
Q. To the claim agent?
A. Yes.
170 Q. Had you ever made a report in this case before that?
A. Of this accident?
Q. No, of any accident?
A. Not as I remember of.
Q. You knew engineer Hector pretty well, didn't you?
A. Yes, sir.
Q. How long had you known him?
A. Well, I had known him ever since I have been on the road, about twelve years.
Q. He is a great friend of yours, isn't he?
A. Yes, a good friend, as all railroaders are.
Q. You would not say anything to hurt him if you could help it, would you?

Mr. Cannon: I object to that as irrelevant, incompetent and immaterial.

The Witness: Not necessarily, no, sir.

Mr. Smyth: It is as to his credibility.
The Court: I think you can bring out the fact and present the inferences to the jury.
Objection sustained.
Mr. Smyth: Exception.

Q. Don't you think you would strain a point if you could help the engineer from being blamed?

Mr. Cannon: Same objection.

A. Certainly not.
Q. Your friend of twelve years' standing?
A. In a case of that kind, no.

Mr. Cannon: I object to that as irrelevant, incompetent and immaterial.
Objection overruled.
Mr. Cannon: Exception.

A. In a case of that kind, certainly not.
171 Q. You are familiar with the rules and regulations of the Erie Railroad regarding the blowing of whistles and the ringing of bells?
A. Yes.
Q. You are familiar with the penalty for not doing so?
A. Yes.
Q. What is the penalty?

Mr. Cannon: I object to that as irrelevant, incompetent and immaterial.

Objection overruled.
Mr. Cannon: Exception.

Q. As it was at the time of the accident, what was the penalty?
A. I have never known it not to happen, so I don't know what it would be.
Q. You mean by that that the Erie Railroad—you never heard of that happening on the Erie Railroad?
A. No, sir.
Q. There is a prescribed penalty in the rules, isn't there?
A. No, sir; there is not.
Q. What?
A. Not that I know of. It is not in our book of rules.
Q. Would not an engineer be in danger of losing his job if he infracted the rule requiring——
A. Certainly he would.

Mr. Cannon: I make the same objection.
Objection overruled.
Mr. Cannon: Exception.

A. Certainly he would.

Mr. Cannon: I move to strike out the answer on the same grounds.
Motion denied.
Mr. Cannon: Exception.

Q. You are making that answer from your knowledge of what the penalty would be, are you not?

172 Mr. Cannon: May I have the same objection to all this line of testimony?
The Court: The witness did not testify to any knowledge on the question, as I recall.
Mr. Smyth: If he did not I want to see whether his answer is competent or not. If not I may consent to have it stricken out.

Q. What did you base your answer on when you said he certainly would lose his job if he infracted the rule regarding blowing the whistle?

Mr. Cannon: I object to that as irrelevant, incompetent and immaterial.
The Court: Objection overruled.
Mr. Cannon: Exception.

By the Court:

Q. Do you understand the question?
A. I don't know just what the penalty would be for anything of that kind; no, sir; I don't—I can't answer that.

Mr. Smyth: If the other side desires to have his answer "Certainly would" stricken out, I will. I don't want a point of that kind raised in the case.
The Court: It is stricken out.

Q. When was it you discovered that it was a wagon you ran into, a team and wagon?

A. After the engine come to a stop I looked back and I saw the horses on the track.

Q. You did not see the wheels of the engine, did you?

A. No, sir; not until I went in front of the engine.

Q. Aren't you testifying with regard to the whistle and bell ringing at that time more because you relied upon the practice being carried out rather than to an independent recollection?

A. No, sir; I am not.

173 Q. You are sure of that?

A. I am positively sure, yes.

Q. You have seen your report lately before you went on the stand, didn't you?

A. Yes, sir.

Q. When was it you saw your report?

A. Several days ago, I don't just recall the date.

Q. Preparing for this trial?

A. Yes.

Q. When were you promoted from fireman to engineer?

A. I think January 26th, 1906.

Q. Then you were in the engineer class at the time of this accident?

A. No, I was promoted, but when business was not good I was fireman.

Q. Were you in the Brotherhood of Locomotive Engineers at the time this accident happened?

A. No.

Q. You are now?

A. Yes, sir.

Q. And Hector is, too?

A. Yes.

Q. So that you have many interests together, have you not?

A. We did at that time, did you say?

Q. Well, you have now and did at that time?

A. Yes, sir.

By Juror No. 7:

Q. In applying the emergency brake was it the custom to blow a whistle?

A. No, sir.

By Mr. Smyth:

Q. Wasn't the whistle blown after the emergency brakes were applied?

A. Not that I heard; not that I can recollect, no.

Q. No bell rung?

A. Certainly a bell is rung. I shut the bell off after the accident happened.

By Mr. Cannon:

Q. The bell was ringing automatically?
A. Yes.
Q. By that you mean it was ringing by compressed air?
A. Yes, sir.

174 WALTER ELLIS, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Where do you reside, and what is your business?
A. I reside in Port Jervis and my business is conductor.
Q. Employed by what railroad?
A. The Erie Railroad.
Q. How long have you been employed by the Erie Railroad?
A. Twenty-three years.
Q. Were you conductor in March 1909?
A. Yes.
Q. A freight conductor?
A. Yes.
Q. On March 3rd, 1909, what train were you running on?
A. I was running train 149.
Q. That is a freight train?
A. Yes, sir.
Q. On the morning of March 3rd, 1909, did you and your train go over the Haverstraw crossing at Sloatsburg?
A. Yes.
Q. Do you know about what time it was?
A. We arrived at the water crane at 10:25, and we are generally ten or fifteen minutes at the water crane.
Q. The water crane is where?
A. Seven or eight hundred feet from the crossing.
Q. Down near the station?
A. East of the station.
Q. How far east of the station?
A. About seven or eight hundred feet east of the station.
Q. When you said seven or eight hundred feet do you mean from the crossing?
A. No, from the station. Not where the accident happened.
Q. Did you pull out from that standing position at the tank?
A. Yes.
Q. And went over the Haverstraw crossing?
A. Yes.
Q. Where were you on that train?
A. I was — rear caboose, on the platform. Do you mean when I left the tank?

175 Q. Yes, then.
A. I was in the caboose when we left the water tank.
Q. How many cars did you have, do you know?
A. Forty-two.

Q. What happened as you approached or got to the Haverstraw crossing?

A. At the depot crossing some young fellow come on the platform of the caboose. I went out and asked him where he was going. He said he was only going a little way. I said "The best policy is for you to get off," and he got off at the next crossing.

By Mr. Smyth:

Q. That would be the Haverstraw crossing?

A. That would be the Haverstraw crossing, yes.

By Mr. Cannon:

Q. As you were going west from Haverstraw crossing did you see anything with respect to train 48?

A. Yes.

Q. What did you see?

A. I heard the whistle first, the crossing whistle, at the white store crossing, and then I heard the station whistle.

Q. Did you see No. 48 go by?

A. Yes, sir.

Q. Where was your caboose when No. 48 went by you?

A. Probably about five or six cars west of the Haverstraw crossing.

Q. How long are those cars on an average?

A. They vary in length. It was a mixed train; box cars go from forty or forty-two feet and coal dumps are less.

Q. How did you happen to observe the whistle of No. 48 as it came through?

A. Because we are on the lookout for those trains? It was the first morning train.

Q. Why were you on the lookout for the train?

A. In case anything happens to our own train we want to
176 use the opposite track, then when we come to the first cross over we get permission to use the cross over.

Q. Is there a regulation or practice of your company with respect to you conductors observing passing trains?

A. When there is a train behind you?

Q. No, is there a regulation or practice of your company with respect to you conductors observing passing trains on the other track *on the other track*?

A. Yes.

Q. What was the rule in practice?

A. Well, the rule in practice was to see that the trains are gone before you use the opposite track.

Q. What is the purpose of it?

A. The purpose of it is to give us a chance to clear the track we are on, if we cannot make a siding, to clear a train behind us and use the opposite track.

Q. You are supposed to know the situation on the other track?

A. Yes.

Q. As you go along?

A. Yes, sir.

Q. You did not see anything with respect to this accident?
A. No, sir.
Q. Did you see No. 48 stop?
A. Yes, sir.
Q. You went on?
A. Yes, sir.
Q. With your train?
A. Yes, sir.

Cross-examination by Mr. Smyth:

Q. Were you on the platform of the caboose?
A. The rear platform.
Q. From the time your train left the Haverstraw crossing until when?
A. Until about well, we should have been about ten or fifteen cars west of the further crossing, not the Haverstraw crossing, but the crossing next to it, when 48 had stopped.
Q. Were you looking behind?
A. Yes.
Q. You saw nothing of the accident at all?
A. Nothing of the accident, only I saw No. 48 stop.
177 Q. Where did you stop?
A. We did not stop.
Q. You stopped sometime?
A. You mean after the accident?
Q. This morning, when did you stop?
A. We stopped by the Sloatsburg water crane.
Q. That was before you got to the Haverstraw Road?
A. Yes.
Q. I mean after that where did you stop?
A. We did not stop this side of Newburg Junction.
Q. How far is that?
A. It is about eleven or twelve miles.
Q. When was the first you heard that an accident had happened at the Haverstraw crossing?
A. About three or four days after that.
Q. The claim agent then saw you?
A. No, sir.
Q. How did you hear about it?
A. From the train master.
Q. Did you turn in any report?
A. No, sir; I did not turn in a report. I made out a statement, that is all.
Q. When did you make out a statement?
A. At the time I was before the train master.
Q. You were brought before the train master?
A. Yes.
Q. That was three or four days after the accident?
A. I should judge that.

Mr. Smyth: Mr. Cannon will you please let me have the date of his statement he made?

By Mr. Cannon:

Q. Can you state positively?
A. No, I can't state positively.
Q. Did you make a formal report on a printed form?
A. On a typewritten form.

178 By Mr. Smyth:

Q. Was it typewritten for you before you signed it?
A. Yes, sir.
Q. You don't know who typewrote it?
A. No, sir.
Q. It was all prepared, is that right?
A. I beg your pardon.
Q. You don't know who did any typewriting, it was not done in your presence?
A. No, not in my presence.
Q. It was all prepared ready for your signature when you were brought to the train master?
A. Yes, sir; it was taken down in shorthand first, what I said, and then typewritten afterwards.
Q. You say it was three or four days after?
A. I judge that.
Q. You judge it was three or four days after?
A. Yes, I won't state positively.
Q. You knew nothing about the accident until that time?
A. No, sir.
Q. Could you recollect, for instance, that the whistle blew on train 48 on the 2nd of March, 1909?
A. Yes.
Q. And the 1st of March, 1909?
A. The 1st of March I could not say which way I was going. I may have been in Port Jervis on the 1st of March.
Q. Do you remember on the 2nd of March you were on that same trip?
A. I was going east on the 2nd of March.
Q. How do you refresh your recollection on that?
A. Because my train book shows that and my report will show that.
Q. You looked up your train book?
A. No, I have not looked it up, but they will show it. You cannot go west on two consecutive days.
Q. How long is your run?
A. Eighty-eight miles.

Q. Do you recollect on the 2nd of March that train 48
179 blew the whistle at Haverstraw crossing and rung the bell?
A. No, sir.

Q. You don't recollect that?
A. Not on the second of March.

Q. When was the last time you went west?
A. I can't say the last time I went west. Before the accident, you mean?
Q. Yes.
A. I can't say.
Q. Was it on alternate days?
A. No, it was on what we call the "First in and first out." Sometimes I am down here a couple of days and sometimes I am in Port Jervis a couple of days.
Q. Do you recollect the bell ringing and whistle blowing on No. 48 on any other day except the 3rd of March?
A. No, not that one certain spot, no, sir; because I probably would not pass her at that spot for quite a while after that.
Q. How long a time?
A. I could not say that.
Q. Two or three or four days?
A. I could not say.
Q. The thing you wanted to know was whether the track on the east bound side of the road was clear?
A. Whether it was clear in case I wanted to use it.
Q. The thing that told you it was clear was the train going by you?
A. Yes, it was clear in regard to that one train.
Q. There was not any particular reason why you recollect the whistle and bell ringing from the 3rd of March down to the time you signed your statement three or four days afterwards, was there?
A. It was in my mind.
Q. It was in your mind?
A. Yes, because of 48 stopping there when there is no regular stop for it.
Q. Is that — told you the whistle had blown, because it stopped there?
A. No, sir; what I heard told me.
Q. What I heard?
A. Yes, sir; the whistle itself.
Q. Can you tell us around that period any other train and
180 give us the number and the date and the crossing where you heard a whistle blow?
A. On that one date?
Q. Yes, on that one date?
A. No, sir; because there was none passed me between there and Newburg Junction only that one train; that is the first early morning train.
Q. No other train passed you?
A. Not while I was on the main line from there to Newburg Junction. I pulled in at Newburg Junction.
Q. Can you tell us on any crossing on any date around 1909 that you can now recollect where the whistle and bell blew and rang?
A. No, I can't—not now I can't.
Q. The fact of the train blowing a whistle before the reaching of the Haverstraw crossing and it stopping down at Sloatsburg station,

those facts were entirely disassociated, they had no relation to one another, so far as you know, had they?

A. I don't understand that question.

Q. You say you remember this whistle blowing when it was at the whistling post?

A. The White Store crossing.

Q. You saw the train go by?

A. Yes.

Q. You never heard of the accident for four days?

A. Well, I judged there was something the matter, because No. 48 stopped there, because it was an unusual thing for a train to stop there.

Q. When had you last seen that train before?

A. On that day?

Q. No, any time around there, when had you last seen No. 48 stop?

A. At Sloatsburg?

Q. Yes?

A. Never.

Q. When had you seen train 48 last, not stop, but when had you seen train 48?

A. I have seen it several times since that.

Q. Around that time had you seen it several times?

A. I had not had occasion to meet her in that one spot.

181 Q. Had you ever had occasion to meet her in that one spot?

A. No, sir; not to my knowledge.

Q. Never had occasion to pass her in that spot?

A. Never to my knowledge in that spot.

Q. You were not familiar with the run of 48, where it did stop, were you?

A. When?

Q. Back in 1909?

A. Only on that one date.

Q. That is the only time?

A. Yes.

Q. So you don't know whether it was proper to stop at Sloatsburg or not?

A. I knew it was not proper for her to stop.

Q. You have learned that since?

A. I have learned she had something to stop for.

Q. You have learned since the accident that it was unusual for that train to stop at Sloatsburg?

A. Yes.

Q. You didn't know it before the accident?

A. Yes, I did know it, that it was unusual for her to stop there.

Q. You say never before had you passed the train at Sloatsburg?

A. Never before at that one spot.

Q. Never before had you travelled on No. 48?

A. Oh, yes, I have travelled on her.

Q. Do you know Hector?

A. Yes.

Q. How many years have you known him?
A. A good many years.
Q. He is a personal friend of yours?
A. Yes, sir.
Q. And Kenyon is also?
A. Yes, we are all workmen together.
Q. Are you still a freight conductor?
A. Yes, and on passenger trains too.
Q. Freight and passenger conductor?
A. Yes.
Q. Were you then a passenger conductor?
A. No.
Q. You have been promoted since then?
A. Yes.

By Mr. Cannon:

Q. As you were going along after you passed the crossing you saw No. 48 stop, did you?
A. Yes.
182 Q. Did you observe the brakes were set tight?
A. Yes.
Q. When he stopped?
A. Yes.
Q. How did you observe that?
A. By the fire flying from the brake shoes.
Q. Was that something unusual?
A. Yes, sir.
Q. For No. 48?
A. That is the emergency application. That is the only thing that could do that.
Q. You were familiar with the run of No. 48 before this accident, weren't you?
A. I was, the time of No. 48.
Q. You knew it was what was called the Southern Tier Express?
A. Yes, sir.
Q. You knew the stops it made, I suppose?
A. Yes, sir.
Q. According to the time-table?
A. By the time-table, yes, sir.
Q. What was the last stop west of Sloatsburg at that time?
A. Goshen.
Q. What was the next stop?
A. West?
Q. No.
A. The next stop was Paterson.
Q. It went from Goshen to Paterson without stopping?
A. Yes, sir.
Q. Did you make any remarks about No. 48 stopping that morning to anybody?
A. Yes, sir.

Mr. Smyth: I object to that as immaterial.
Objection sustained.
Mr. Cannon: Exception.

By Juror No. 4:

Q. Was your train in motion?
A. Yes, sir.
Q. When you passed the express?
A. Yes, sir, going about four or five miles an hour. It is upgrade there.

183 By the Court:

Q. Your train was going west at the rate of forty-five miles an hour?
A. No, sir; four or five miles an hour.
The Court: I misunderstood you.

GEORGE H. FOSTER, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. State your occupation and place of residence?
A. Flagman on the Erie Railroad. My residence is at Corning, No. 28 West Erie Avenue, Corning, New York.
Q. Were you a flagman in 1909?
A. Yes, sir.
Q. How long have you been employed by the Erie Railroad?
A. Thirty-eight years.
Q. You reside at Corning?
A. Yes, sir.
Q. In March, 1909, were you running on trains?
A. Yes.
Q. Were you on No. 48 on March 3rd, 1909?
A. Yes.
Q. Were you a flagman on that train on that day?
A. Yes.
Q. As you were going in to Sloatsburg where were you?
A. In the rear sitting in the Pullman on the south side.
Q. Did you give any attention to bells or whistles as you were going through Sloatsburg?
A. I did not, no.
Q. What was the first you knew about something happening there?
A. When the brakes went in emergency.
184 Q. Then what did you do?
A. Got up and went out to see what was the matter.
Q. Then what did you do?
A. Went out on the rear platform and got off on the east side and looked toward the engine. I knew something must have occurred to make us stop that way, and I saw the engineer coming towards me.
Q. Where did you go then?

A. I met him, that is within speaking distance and he told me he had struck someone on a crossing. I went back towards the crossing then and started back with a flag to protect the hind end of the train.

Q. How far back did you go?

A. I went back to the crossing first and stopped on the crossing, just before I got to the crossing I stopped——

Q. Then did you go on towards the west?

A. Yes, sir.

Q. How far west did you go?

A. I went as far as the crossing the first time—shall I state what I done at that time?

The Court: You can answer the question.

Q. Then did you go west?

A. Yes, sir; after that.

Q. After that you went west?

A. Yes.

Q. With your flag?

A. Yes.

Q. To protect your train?

A. Yes.

Q. And you stayed there how long?

A. Until I was called in.

Q. By that you mean what?

A. When I was called in by the engineer, when they were ready to go.

Q. Then you went back to your train and went on?

A. Yes.

No cross-examination.

185 DAVID HENION, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Where do you reside and what is your business?

A. Sloatsburg, signalman, interlocking switchman and telegraph operator.

By Mr. Smyth:

Q. Of the Erie Railroad?

A. Yes.

By Mr. Cannon:

Q. Signalman and interlocking switchman and telegraph operator for the Erie Railroad Company?

A. Yes.

Q. You have been there how long?

A. Nineteen and one-half years.

Q. Were you an operator on March 3rd, 1909?

A. Yes.
Q. At Sloatsburg?
A. At Sterlington Junction.
Q. Where is that with reference to Sloatsburg?
A. About a mile from Sloatsburg station.
Q. You lived at Sloatsburg at the time?
A. Yes.
Q. What time did you go to work that morning, March 3rd, 1909?
A. About 5:45 past Sloatsburg, that is my regular time passing there.
Q. What do you mean by passing there?
A. Going by Sloatsburg station.
Q. How did you go?
A. I went that morning by the Orange County Turnpike.
Q. Walking?
A. Yes.
Q. Where did you live at that time?
A. About a mile west of Sloatsburg station.
Q. That would be west of the Haverstraw crossing, as we call it here?
A. Yes.
Q. You came down to the crossing that morning?
A. Yes.
186 Q. And went on down east of the crossing?
A. Yes.
Q. Along the turnpike?
A. Yes.
Q. The turnpike is on top of this embankment?
A. Yes, and then I went on east from the embankment down the hill there that goes down the grade.
Q. Then what road did you take from the crossing?
A. The Orange Turnpike.
Q. Where were you going?
A. To Sterlington Junction, to the tower to work, but the reason why I was going on the turnpike——
Q. What time did you go by the Haverstraw crossing or near there?
A. I would say it was about five-forty-three, about that time, between five-forty-three and five-forty-five.
Q. What time did you have to go to work?
A. Six o'clock.
Q. You did not see this accident?
A. Not when it happened, no.
Q. Did you hear or see No. 48 go by as you were on the turnpike?
A. Yes.
Q. What did you do as you were going down the turnpike before you reached the station?
A. What did I do?
Q. Yes.
A. I was going to the post office.

Q. Then what did you do?
A. Dropped two letters in the box.
Q. Then what did you do?
A. I was going toward the railroad track, not eastward, but toward the east, toward the railroad track again after I got the letters in the post office box, going through by Mr. Waldron's barn, making a short cut to the railroad, and I heard No. 48 whistle for the crossing, and then I started to run, I wanted to cross ahead of it, and I got over on the railroad track and No. 48 was coming into Sloatsburg station and I stopped and looked and wondered why she was stopping there.
187 Q. Did she stop there?
A. Yes, the engine stopped just east of Sloatsburg station.
Q. Did you observe anything with respect to the engine bell?
A. The bell was ringing coming into Sloatsburg station.
Q. What did you do after that?
A. The engineer got off the engine with his torch and came around the front end of the engine and then I saw the pair of wagon wheels on the front end of the engine, so I ran back.
Q. Back where?
A. Back to the engine. I mistrusted what had happened right away because I had met——
Q. Never mind that. That is all you did?
A. Yes.
Q. What did you do then?
A. Walked back to the scene of the accident with the engineer.
Q. Then what did you do?
A. Helped to roll a dead horse off the track.
Q. You stayed around there for a while, and then you went away?
A. Yes.
Q. How far is your tower east of Sloatsburg station?
A. About one mile.
Q. What time did train 143 go by your tower?
A. I would have to look at the block sheet.
Q. On the morning of March 3rd, 1909.

(Witness examines paper handed to him by the defendant's counsel.)

A. 6:39 A. M.
Q. That was a freight train?
A. Yes.
Q. Going west?
A. Yes.

Cross-examination by Mr. Smyth:

Q. Where is the post office that you dropped the letters in with regard to the Haverstraw crossing?
188 A. Southward. I can't give you the exact distance. I can make an estimate on it.
Q. Give us an estimate on it?
A. I would say probably seven or eight hundred feet.

Q. East or west?
A. Southward direction.
Q. Is it on the Haverstraw road?
A. It is on the Orange turnpike.
Q. Is it nearer Sloatsburg station from the Haverstraw road or is it west?
A. It is southwest from the Haverstraw station.
Q. What I want to get at is, were you on the Orange Turnpike?
A. Yes.
Q. The Orange Turnpike crosses the Haverstraw road or runs into Haverstraw road, doesn't it?
A. The Haverstraw road runs into the Orange Turnpike just south of the crossing where the accident happened, southwest of the crossing where the accident occurred.
Q. How far from the place where the accident occurred is the post office?
A. Seven or eight hundred feet, I should judge.
Q. You passed the Haverstraw crossing before you came to the post office?
A. I passed by it going southward on the Orange Turnpike.
Q. You say you passed by the Haverstraw crossing at five-forty-three?
A. About that time; yes, sir.
Q. Then you went on to the post office?
A. Yes.
Q. That was about seven or eight hundred feet?
A. I should judge so.
Q. You dropped a couple of letters in there?
A. In the box outside.
Q. Then what did you do?
A. Went east across the railroad tracks again, a short cut through by Mr. Waldron's barn.
Q. How far is it to Mr. Waldron's barn?
A. I should say probably 100 feet from the post office, probably a little more.
189 Q. Where did you see train 48?
A. When I go over on the tracks going into Sloatsburg station the train was there.
Q. You saw it coming in?
A. Coming into the station.
Q. How many minutes was that altogether after you had passed the Haverstraw crossing?
A. After I passed the Haverstraw crossing—I can give you an estimate.
Q. Yes, your estimate, of course?
A. I would say probably a minute and a half.
Q. That would bring the time up to almost 5:45, do you think?
A. Yes, sir; about that.
Q. It probably was more than that, wasn't it?
A. I don't think it was much more than that.
Q. That train is due to pass Sloatsburg at 5:30, isn't it?

A. I don't think so.
Q. You ought to know?
A. She went through on her regular time. Her time is around 5:42 or 5:43.
Q. The engineer has testified it was 5:30.
A. I can't help that.
Q. You cannot help that?
A. No.
Q. That accident happened at 5:35.
A. I would not say so.
Q. The whistle and bell you heard was at 5:45?
A. About that time.
Q. You are very accurate about your time, aren't you?
A. I know the time I go down every morning, I know what time I have to be at work.
Q. You say you heard a whistle. You were not inside of the railroad track at all then, were you?
A. No, sir; I was by Mr. Waldron's barn.
Q. Mr. Waldron's barn is between Sloatsburg station and the Haverstraw crossing, isn't it?
A. No, sir; it is not.
Q. Where is it?
A. Where is it from what point?
190 Q. Where is it from the Haverstraw crossing?
A. Southward, about seven or eight hundred feet, I should judge.
Q. Mr. Waldron's barn is?
A. Yes.
Q. It is also towards Sloatsburg station, too, isn't it?
A. It is southwest from Sloatsburg station.
Q. From the Haverstraw crossing, it is southeast, isn't it?
A. What is southeast?
Q. Waldron's barn?
A. No, it is not.
Q. What is it?
A. Southwest, I should say.
Q. Southwest from the Haverstraw crossing?
A. I should say so.
Q. You mean that going toward Sloatsburg, you get to Waldron's barn first, and the Haverstraw crossing next, and then the——
A. I don't understand that question.
Q. Waldron's barn, if you were coming from the west towards Sloatsburg, you would go by the Haverstraw crossing first, and then come to Waldron's barn after that, wouldn't you?
A. Oh, yes.
Q. Then Waldron's barn is east of the Haverstraw crossing towards Sloatsburg?
A. Yes, but I said in a southwesterly direction.
Q. How near to the station is Waldron's barn?
A. I can't say.

Q. You have been pretty accurate in telling us where the post office was. You know that locality. Can you give us any idea?
A. I can give you an estimate.
Q. Yes?
A. It is according to which way you want to go, around the road or across lot.
Q. Well, across lots?
A. Across lots, well, probably Waldron's is three or four hundred feet, maybe more.
Q. At that time there was a wooden platform at this station that was about three hundred feet long?
191 A. I don't know the length of it. There was a wooden platform. I don't know the length of it.
Q. Wouldn't that be about right, three or four hundred feet?
A. About 250 feet or probably 300 feet, I should judge.
Q. Did you hear the emergency brake grinding?
A. I heard nothing about brakes; no, sir.
Q. When you got there, you say the engineer came out with his torch?
A. After he made his stop, yes.
Q. What kind of a torch was it?
A. A regular torch they have on the engine.
Q. A keresone torch?
A. Kerosene torch; yes, sir.
Q. A torch for lighting purposes?
A. Yes, sir.
Q. Where did he go with this torch?
A. In front of the engine.
Q. To see what was on it?
A. I suppose that was what he went there for. I don't know.

By Mr. Cannon:

Q. These torches are to look under the engine and inspect the engine?
A. Yes.
Q. For inspection purpose?
A. Yes.

EUGENE J. PADIEN, called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Mr. Cannon: I wish to let Mr. Von Bernuth examine this witness. He is more familiar with the subject than I am.

Direct examination by Mr. Von Bernuth:

Q. What is your business?
A. Division operator of the Erie Railroad.
192 Q. What was your business in March, 1909?
A. Train despatcher.
Q. Where?
A. The Erie Railroad Company, Jersey City.

Q. What are the duties of a train despatcher or what were they in March, 1909?

A. Despatch trains and record trains.

Q. Just tell how the office is run, how you get the reports of trains along the line.

A. When a train leaves the terminal, we have certain towers along the line that report trains.

Q. Report the passing of the trains?

A. As the train passes the tower, the operator reports it on the wire and we record it on the train sheets.

Q. As the train passes the tower, the towerman in that tower reports to your office?

A. Yes.

Q. That is true of all towers as far west as Port Jervis?

A. Yes.

Q. And was true in March, 1909?

A. Yes.

Q. Were you on duty on the morning of March 3, 1909?

(The witness examines the train sheet.)

A. Yes, sir.

Q. When were you on duty that day?

A. 11:00 P. M. on the night of March 2 to 7:00 on the morning of March 3.

Q. You were off duty starting at seven A. M. March 3, 1909?

A. Yes.

Q. Are the entries on that sheet prior to 7:00 A. M. March 3, 1909, in your handwriting?

A. Yes, sir.

Q. Are those entries made pursuant to reports wired in to you by the operators in the different towers?

A. Yes.

Q. On the morning of March 3, 1909, did you receive reports from operators at towers called SJ and XK?

A. Yes.

193 Q. Where is SJ tower?

A. Sterlington Junction.

Q. That is east of Sloatsburg?

A. Yes.

Q. Where is XK tower?

A. It is known as West Tuxedo.

Q. That is west of Sloatsburg?

A. Yes.

Q. Isn't there any tower between those two points?

A. No.

Q. That is SJ and XK?

A. No, sir.

Q. What time did train 48 pass XK, that is West Tuxedo tower, on the morning of March 3, 1909, going east?

A. It passed XK tower at 5:39 A. M.

Q. How far is XK tower from Sloatsburg?

A. I should say about three and one-half miles.

Q. How far would you say SJ, that is Sterlington Junction tower, was east of Sloatsburg?

A. About a mile.

Q. What time did No. 48 pass SJ tower at Sterlington?

A. 6:14 A. M.

Q. What time in the morning of March 2, 1909, did that train known as Second No. 75 pass SJ tower at Sterlington westbound?

A. It passed SJ at 5:56 A. M.

Q. West bound?

A. Yes.

Q. What time did train Second 75 westbound, on the morning of March 3, 1909, pass XK tower at West Tuxedo?

A. 6:20 A. M.

Q. What time did the train known as 1843 west bound pass SJ tower, Sterlington, on that morning?

A. March 3?

Q. March 3, 1909?

A. It passed Sterlington at 6:39 A. M.

Q. What time did that train pass XK tower at West Tuxedo?

A. 7:15 A. M.

Mr. Smyth: I object to this as encumbering the record.

The Court: What do you expect to prove by this witness?

194 Mr. Cannon: That this train was in the circuit at the time plaintiff's witness says this bell was ringing. So as to explain why the bell was ringing.

Cross-examination by Mr. Smyth:

Q. Where is this tower east of Sloatsburg, Sterlington Junction tower?

A. Yes.

Q. How far east of Sloatsburg station?

A. I should judge about one mile.

Q. Train No. 1843, coming west, was that a freight train?

A. Yes.

Q. That is recorded at the time you have when the engineer passes your tower, isn't it?

A. It should be when the train had passed there.

Q. If it is a slow moving freight train of forty cars, which is it, when the engine or the caboose has passed?

A. The time is supposed to be reported when the train is passing the tower.

Q. Passing, then there is nothing particularly accurate about the time, if it is a slow moving train, it might be the time when the first car or the middle passed and it takes about a minute to pass?

A. There might be a variation of a minute in the time.

Q. The West Tuxedo tower, XK, which is the next, that is three and one-half miles from Sloatsburg west?

A. I just estimated it. I don't know the exact distance. I should say about three and one-half miles.

Q. It may be more than that?
A. I don't think it is any more.
Q. You have no record of when train 48 stopped at Sloatsburg, have you?
A. No, sir.
Q. That was not reported to you?
A. There is no one there to report it.

195 DAVID MARION, called as a witness in behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Cannon:

Q. State your occupation and place of residence.
A. Signalman, employed by the Erie Railroad, living in Paterson, New Jersey.
Q. How long have you been employed by the Erie Railroad?
A. Five years.
Q. You were a signal man and having to do with signals as a signal maintainer in March, 1909?
A. Yes, sir.
Q. Did you, in March, 1909, go to Sloatsburg?
A. What morning?
Q. I show you this paper, I believe it is yours, and I ask you if you went there during the month of March, 1909.

(The witness examines the paper handed him by counsel.)

A. Yes, sir; I went there on the 2nd of March, that was the first time in the month of March, 1909, that I went to Sloatsburg.
Q. Why did you go there?
A. We had an accident west of there, a coal car derailed and broke the telegraph pole, which broke the line wires controlling the signals. I went there to make repairs.
Q. Did you have a report of that accident?
A. No, sir; only from the operator at Sterlington, I believe.
Q. He reported to you?
A. I don't know who reported it. The report was on my book at headquarters.
Q. You got a report of it?
A. Yes.
Q. That it interfered with the signal wires, is that it?
A. That it interfered with the signal wires, yes, sir.
196 Q. What did you do?
A. I went there and found one of my wires, my line wire, broken.
Q. When did you go there?
A. I don't know just exactly the time, but probably about ten o'clock.
Q. In the morning?
A. In the morning.
Q. Did anyone go with you?
A. My helper.

Q. Who is he?
A. Mr. Knapp.
Q. Is he in court?
A. Yes, sir.
Q. What did you do when you got to Sloatsburg?
A. I did not stop at Sloatsburg; I went west where the car was derailed.
Q. Where did you get off?
A. I went with my hand speeder. I got off at the accident.
Q. You mean those small three-wheeled cars, the velocipede?
A. Yes.
Q. What did you do there?
A. Made repairs to my wires.
Q. What wires?
A. The line wires controlling the signals which were in my charge.
Q. Those wires controlled what?
A. Signals and crossing bell at Sloatsburg.
Q. By signals, you refer to what?
A. The automatic signals which the trains are governed by.
Q. At that point, at that time, did they have electric automatic signals?
A. Yes.
Q. Those signals controlled train operation?
A. Those signals controlled train operations; yes, sir.
Q. When a train went over a certain point, a signal would be set a certain way?
A. Yes.
Q. That was all done electrically?
A. Yes.
Q. As a part of that system of crossing bells and — were maintained with them, were they not?
A. Yes.
Q. Did that include the crossing bell at Haverstraw crossing as we have known it here?
A. Yes.
Q. After you made your repairs, did you make any test of the crossing bells or signals?
A. I went back—the accident happened right at the signal,
197 the only signal which it affected, and the crossing bell at Sloatsburg, and I tested out the signal and my headquarters were at Suffern, and on the way down, back to Suffern, I stopped and tested the crossing bell.
Q. How did you do that?
A. By putting it through the operation which a train would put it through, both for east and west bound trains.

By Mr. Smyth:

Q. Tell us what you did.
A. By shunting out the track rails which were controlled from the track.

Mr. Cannon: Where?

Q. Where?
A. The circuit starts east of the bell on the west bound track and west of the bell on the east bound track.

By Mr. Cannon:

Q. Where was the contact point on the west bound track approaching Haverstraw road crossing?
A. About fourteen hundred feet west of the crossing.
Q. That would be about how many feet east of the station?
A. I should judge about 500 feet.
Q. On the east bound track, where was the contact point?
A. About 2,100 feet west of the Haverstraw crossing.
Q. What did your test show with respect to the crossing bell?
A. It showed the crossing bell was in perfect condition.
Q. What time did you leave Sloatsburg?
A. After four o'clock in the afternoon.
Q. Did you visit that place again?
A. The following morning, March 3rd.
Q. Why did you do that?
A. I heard of the accident.
Q. Was it reported to you?
A. It was not reported to me. I just heard of it at the tower where I was stationed.
198 Q. You have a certain tower where you stay most of the time?
A. Yes.
Q. That is where you get your reports?
A. That is where we get our orders.
Q. That was at Suffern?
A. Yes.
Q. That was March 3, 1909?
A. March 3, 1909.
Q. What did you do then?
A. Went to Sloatsburg.
Q. When?
A. On train twenty-one; that is the first train west after I went on duty; probably at nine o'clock when I got to Sloatsburg, or a little after.
Q. Who was with you then?
A. My helper.
Q. Anyone else?
A. On the train I met Mr. Pfitzner, the crossing supervisor.
Q. Did you all get off at Sloatsburg?
A. Yes.
Q. All three of you?
A. Yes.
Q. What did you do, then, at Sloatsburg?
A. I ran ahead when I got off train No. 21. I ran ahead to the crossing to see if the bell was working for west bound trains. The

bell was ringing and rang until the train got off the circuit at the crossing.

Q. Did it stop then?

A. Yes. I waited then until train No. 42, due at nine-thirty came east, and I listened for the bell, and then it worked O. K. for east bound trains.

Q. What do you mean by "working O. K.?"

A. Starting to ring at the contact point and stopped ringing as the train got off the crossing.

Q. You stated Mr. Pfitzner and Mr. Knapp were with you?

A. Yes.

Q. That was on the morning of March 3, 1909?

A. Yes.

199 Cross-examination by Mr. Smyth:

Q. What is the contact point?

A. It is the relay, a mechanical device controlled electrically.

Q. The contact is held in contact by the weight of the train crossing over?

A. No; it is through an electric circuit through the rails.

Q. It is the weight of the train that brings that about?

A. No, sir.

Q. What happens when the train goes over?

A. It short-circuits the track circuit which controls the track relay.

Q. That is done by the weight of the train?

A. No; it is the metal substance of the wheels and axles which causes a short circuit.

Q. That is to say, the space between the rails on one track is closed by the metal wheel passing over?

A. No; from one rail to the other.

Q. As soon as the train leaves that point, then the circuit is opened again?

A. No; it stays open until it gets off the circuit. The circuit is normally closed. The train opens it when it strikes it.

Q. Then it closes as soon as the train leaves that point?

A. As it gets off the circuit.

Q. As the last car leaves that point?

A. Yes.

Q. Where the relay is?

A. No; the circuit runs for 2,100 feet.

Q. The whole circuit is 2,100 feet?

A. The whole circuit is 2,100 feet.

Q. The contact point is different on one track than on the other?

A. Yes; there are two sides to it, the positive side and negative.

Q. On the east bound track the point is 2,100 feet west of the Haverstraw crossing?

A. Yes.

Q. That is about the whole length of the circuit?

A. That is the length of that circuit; yes.

200 Q. As the train passes the Haverstraw crossing then the bell stops ringing, if in order, for an east bound train?

A. Yes.
Q. Is that right?
A. Yes.
Q. And going the other way, when a train gets to a point 1,400 feet east approaching the Haverstraw crossing, going west, it starts the bell ringing?
A. Starts the bell ringing.
Q. Then it continues to ring up to what point?
A. Until the last wheel on the last car passes the crossing.
Q. Passed the crossing?
A. The east end of the crossing.
Q. So that a train going east and standing down by the Sloatsburg station will not cause the bell to ring, will it?
A. Not if the hind end is off the crossing.
Q. A train going west will not start that bell ringing until the engine gets within 1,400 feet east of the Haverstraw crossing on the west bound track; is that right?
A. That is right.
Q. You say that you came to the scene of the accident about nine o'clock that morning?
A. About nine o'clock or a little after.
Q. Why were you sent for?
A. I was not sent for. I went there on my own business. The bell was in my charge and it was up to me to explain why, if it was out of order, and I just covered that on my own account.
Q. What word came to you that made you interested that morning?
A. There was no word came to me, not officially.
Q. What unofficial word came?
A. I just heard in the tower that an accident happened at Sloatsburg.
Q. Why did that interest you?
A. The crossing bell was in my charge.
Q. It had been repaired the day before?
A. Not the bell, the wire.
201 Q. What was the matter the day before?
A. The line wire was down, broken, and the bell was ringing continually.
Q. The bell was ringing continuously the day before the accident?
A. Yes.
Q. If this bell was ringing continuously the day of the accident, you were to blame?
A. I would have been; yes.
Q. You did get word unofficially that the bell was reported as ringing, didn't you?
A. No; I did not get any report of the bell working either way. I just heard there was an accident.
Q. Didn't you hear anything about the bell at all?
A. None whatever.
Q. By the time you got there, the trains had all disappeared?

A. There was not any around.
Q. You say the bell was not ringing when you got there?
A. No; only for the trains.
Q. Your immediate superior is Mr. Pfitzner?
A. No; I come under the superintendent of signals.
Q. Who is Mr. Pfitzner?
A. A crossing supervisor.
Q. In what way?
A. I don't know.
Q. Does he have anything to do with crossing bells?
A. No; only looks over the books which the crossing men use who are on the crossings.
Q. Did you and he happen to go there by accident?
A. Just by accident, that is all.
Q. Didn't you send word you were going down there?
A. No.
Q. Didn't the crossing superintendent suggest you go and look at that bell?
A. No, sir; I met him on the train on my way there.

By the Court:

Q. Was there a man stationed at this crossing?
A. No.
202 Q. You say, I believe, Mr. Pfitzner's business was to attend to the books of men stationed at crossings?
A. Yes; and where there were no men stationed on the crossings, the section boss had charge of the record of crossings.

By Mr. Smyth:

Q. Who was with you beside your helper, beside Mr. Pfitzner and your helper when you came to inspect this bell after the accident?
A. That was all.
Q. What time of the day was it, March 2, that this wreck was?
A. I don't know just what time. It was early in the morning before I came on duty.
Q. When did you and your helper go down there to fix this bell?
A. Probably ten o'clock in the morning; I don't know the exact time. It was around ten.
Q. This bell had rung continuously on other occasions before this accident?
A. Not that I know of.

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

Mr. Smyth: His answer is, "Not that I know of." It was favorable, but if you want it out, it may go out.

Q. How long had you been in charge of that bell?
A. About a month.
Q. When you took charge, did you make an inspection?
A. Made an inspection, yes, sir, of everything.

Q. It was not until the day before the accident that this trouble with the bell developed, of it ringing continuously?
A. Yes.

203 Redirect examination by Mr. Cannon:

Q. If the train was standing near the station on the west bound track, would the bell at the crossing ring?
A. As long as he stood there.
Q. Ring as long as he stood there?
A. Yes.
Q. If the train was standing anywhere——

Mr. Smyth: How is it material to this case? There is no evidence of a train standing on the west. We have evidence that at 6:29 the train was down a mile from that, 5,208 feet, at the tower.

Q. If a train was standing on the west bound track anywhere between the Haverstraw crossing and the contact point, which is how many feet?
A. 1,400 feet.
Q. 1,400 feet east of it?
A. Yes.
Q. The crossing bell would ring, would it not?
A. Yes.

Mr. Smyth: I object to that testimony on the ground it is contrary to their own testimony that there was no train within the circuit of 1,400 feet on the west bound track.

WALTER H. KNAPP, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Where do you reside and what is your occupation?
A. I reside at Suffern and I am employed by the Erie Railroad Company as a signal maintainer.
Q. Are you the Mr. Knapp that Mr. Marion spoke of?
A. I am.

204 Q. How long have you been employed by the railroad company?
A. Six and one-half years.
Q. Where were your headquarters in March, 1909?
A. Suffern, New York.
Q. Were you assistant to Mr. Marion at that time?
A. I was.
Q. What was your business as a signal maintainer?
A. At that time I was Mr. Marion's helper.
Q. And had to do with what?
A. I looked after the battery and had to help the maintainer in any work he required of me.
Q. Do you recall going to Sloatsburg, New York, on the 2nd of March, 1909?

A. I do.
Q. With whom did you go?
A. Mr. Marion.
Q. How did you go?
A. With a velocipede car, a speeder we call it.
Q. About what time did you arrive at Sloatsburg?
A. About ten o'clock in the morning.
Q. What did you do there—by the way, why did you go?
A. We had a report from headquarters that a car had been derailed and knocked down some of our line wires.
Q. Those line wires controlled what?
A. Controlled the operation of automatic signals and crossing bells.
Q. The automatic signals control the operation of trains?
A. Yes, sir.
Q. Did the same battery take care of the crossing circuit as well as the signal circuit?
A. No; the crossing bell has a separate battery. That is, the battery that operates the bell is separate from the battery that controls the relay controlling the bell, also helps to control the signal in the rear.
Q. There is some battery there that had to do with the bell, the crossing bell and the automatic signals?
A. Yes.
205 Q. By automatic signals, you refer to the semaphores?
A. I refer to the semaphores.
Q. When you got to Sloatsburg, what did you do?
A. We repaired the line wires where they were down.
Q. Where were they down?
A. About 2,000 feet west of the Haverstraw crossing. That was on March 2nd.
Q. March 2nd?
A. Yes.
Q. After the repair was made what did you do with respect to the crossing bell?
A. We made an inspection of the crossing bell on our way back to Suffern.
Q. Now, you are referring to the crossing bell at the Haverstraw crossing?
A. Yes.
Q. How did you make that test?
A. Mr. Marion shunted out the track relay.
Q. Have you measured the point of contact on the west bound track west of the Haverstraw crossing?
A. On the east bound track west of the Haverstraw crossing?
Q. No; on the west bound track east of the Haverstraw crossing?
A. East of the Haverstraw crossing I have.
Q. What is that distance?
A. It is approximately 1,480 feet.
Q. The rails are charged, are they not, with electricity?
A. Yes, sir.

Q. For a distance of what we call here, the circuit, is that right?
A. Yes.
Q. When you have got a metal substance connecting the two rails, what happens?
A. It short-circuits the track battery and opens the relay.
Q. Then what happens?
A. Starts the bell ringing.
Q. When the train is without the circuit?
A. The bell stops.
Q. The point of contact east of the Haverstraw road, the west bound track, was measured by you, was it not?
A. Yes.
206 Q. You took the measurement with a tape line?
A. No; I measured it by counting the number of rails from the starting point to the crossing and allowed thirty-three feet for each rail.

By Mr. Smyth:

Q. The point of the contact?
A. The contact point.

By Mr. Cannon:

Q. On March 3rd, 1909, the day after the day you were at Sloatsburg making repairs, what did you do with respect to going to Sloatsburg?
A. Went there on train No. 21 and arrived there between nine and nine-fifteen.
Q. With whom did you go?
A. Mr. Marion; and we met Mr. Pfitzner on the train.
Q. When did you go there?
A. Between nine and nine-fifteen; I don't know the exact minute.
Q. What did you do when you got there?
A. Mr. Marion ran ahead to see if the bell was ringing and I had his tool bag on my back and I got to the crossing as soon as possible and I arrived there just as soon as the train we went on arrived at the crossing and the bell was ringing.
Q. What happened when the train left the crossing?
A. The bell stopped ringing.
Q. That is, at Haverstraw road?
A. Yes; then we stayed there until about nine-thirty.
Q. What did you do during that time?
A. We saw if the bell rang for east bound trains.
Q. Did an east bound train go by while you were there?
A. Yes.
Q. What happened?
A. The bell rang when the train was on the circuit and when the train went off the circuit it stopped ringing.
Q. You made no repairs to the bell that day?
A. None whatever.
207 Q. You left Sloatsburg at what time?
A. Nine-forty or nine-forty-five.

Q. On your velocipede?
A. No; we were walking.
Q. This bell was within the jurisdiction of Mr. Marion, wasn't it?
A. Yes.
Q. He and you had charge of it?
A. He had charge of it.
Q. You were his assistant?
A. I was his assistant.

CHARLES PFITZNER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Please state your occupation and residence.
A. I reside at Waldwick, New Jersey. I am crossing supervisor for the Erie Railroad.
Q. How long have you been employed by the Erie Railroad Company?
A. About twenty-eight years.
Q. What was your position in March, 1909?
A. Crossing supervisor.
Q. How long have you been crossing supervisor, about?
A. About five years and two or three months, I think; something in that neighborhood, since October 26th, 1908.
Q. What are the duties of your position as crossing supervisor?
A. Why, I have charge—that is, to see that any safety appliances which are at crossings are in working condition and have charge of the crossing men who are employed on the crossings, and if there is any accident or anything, to make a report of the same.
208 Q. When you refer to appliances at crossings, you mean what?
A. Bells, gates or any other appliance, and flagmen, of course any safety appliance.
Q. Flagmen and crossing men are under your charge, are they?
A. Yes.
Q. What was the extent of your jurisdiction along the Erie Railroad in March, 1909?
A. From Jersey City to Port Jervis.
Q. That included Sloatsburg, New York, did it not?
A. Yes.
Q. On March 3rd, 1909, did you go to Sloatsburg?
A. Yes.
Q. What for?
A. I was informed that there was an accident at the crossing at Sloatsburg.
Q. What did you do?
A. I went to Sloatsburg on train 21.
Q. From where?
A. I took train twenty-one at Ridgewood. I was informed at

Paterson and I took train three hundred seven from Paterson to Ridgewood and train twenty-one from Ridgewood to Sloatsburg.

Q. Whom did you meet on the train?

A. I met Mr. Marion there, the maintainer.

Q. Did you also see Mr. Knapp?

A. I don't remember seeing Mr. Knapp.

Q. Did you get off at Sloatsburg?

A. Yes, sir.

Q. What did you do?

A. Walked up to the crossing.

Q. The Haverstraw crossing?

A. Yes, sir.

Q. What did you do then?

A. Stayed there until train forty-two came east and listened to see whether the bell was ringing.

Q. Was the bell ringing when you got there?

A. No, sir.

Q. How long did you wait there?

A. I don't know exactly, probably fifteen or twenty minutes, somewhere in that neighborhood before train 42 came.

209 Q. Did the crossing bell ring during that time?

A. Not while I was there, no; not until train 42 was coming.

Q. Train No. 42 was running in which direction?

A. East.

Q. What happened as train 42 approached the Haverstraw crossing?

A. The bell rang. It started to ring when the train was some distance from the crossing, I don't know the exact distance, but it was quite a ways above.

Q. You have nothing to do with repairs of crossing bells, have you?

A. No, sir.

Q. Did any other train go by while you were there?

A. No; train No. 42 was the only train that passed while I was there.

Q. After train No. 42 left the Haverstraw crossing, did the bell stop ringing or not?

A. I could not say because I was down a distance from the crossing and I took train No. 42 from Sloatsburg east.

Q. Where did you make the test of the ringing of the bell; at the crossing?

A. No; between the crossing and the Sloatsburg station, so that I could run and catch train 42.

Q. It was not ringing when you got there?

A. No.

Q. It started to ring when No. 42 came?

A. Yes.

Q. As soon as you heard it ringing, you went down to the station?

A. I was a little ways east of the station so I could catch train No. 42.

Q. East of the station?
A. East of the crossing, I mean.
Q. As soon as you heard the bell ring, you went down to the station?
A. Went down and took the rear end of train No. 42 and went east.

210 Cross-examination by Mr. Smyth:

Q. The platform of the Sloatsburg station is 812 feet from the Haverstraw crossing?

(No response by the witness.)
Mr. Smyth: Isn't that right, Mr. Von Bernuth?
Mr. Von Bernuth: 812 feet.

Q. The platform itself is about 400 feet long, isn't it?
A. I can't say.

Mr. Von Bernuth: From the north side of the station building to the crossing is 812 feet and 6/10.
Mr. Smyth: Have you the measurement of the platform itself?
Mr. Von Bernuth: The station platform?
Mr. Smyth: Yes.
Mr. Von Bernuth: No.

Q. The station platform is long enough to accommodate about eight cars, is it not?
A. About that, I should judge.
Q. If we take the length of each car at sixty-three or sixty-four feet, you would have the platform, altogether, as more than five hundred feet?
A. I don't know the exact measurements of the platform.
Q. Do you know where the contact point on the west bound track is?
A. No.
Q. You don't know that?
A. No.
Q. It is just a little bit below the east end of the platform, isn't it?
A. I was informed it was east of the station, but I could not say where.
Q. Did you see any sign on the crossing signal?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.

211 Q. When you got there on the day of the accident——

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.
The Court: Objection overruled.
Mr. Cannon: Exception.

A. Did I see any sign there?
The Court: This was the question, yes; answer the question, don't repeat it.

The Witness: No, sir.

Mr. Smith: I ask permission to recall the witness Marion.
The Court: Yes.

DAVID MARION, a witness on behalf of defendant, recalled for further examination by the plaintiff, testified as follows:

By Mr. Smyth:

Q. You say you were there on the 2nd of March?
A. Yes.
Q. Was there any sign hanging right under where the bell was?
A. No, sir.
Q. Isn't it a fact that it was out of order?
A. No, sir; no sign there.
Q. You say positively there was no sign there?
A. Yes, sir.
Q. Do you say there was no sign the next day?
A. No, sir.
Q. You don't say that?
A. There was none there while I was there. I did not see any.
Q. You know what I refer to, don't you?
A. Yes.
212 Q. What I want to find out is whether there was a sign painted on a wooden board hung just below the bell which said, in effect or substance, "Bell out of order"?
A. There was none there.
Q. And whether that was there on the day of the accident——
A. There was none there the morning of the accident or the day before.
Q. When a bell is out of order you have such signs?
A. We do now; yes.
Q. You did then, didn't you?
A. Not that I know of.
Q. The crossing bell does get out of order every now and then, doesn't it?
A. Yes.
Q. Ever since the thing has been installed; that is true, isn't it?
A. Yes.
Q. Do you mean to say in 1909, when a bell got out of order that they did not put a sign on it?
A. Not that I know of.

Mr. Smyth: That is all. I think now, your Honor, that I should be allowed to reinstate the testimony of the witness Smith with regard to the sign.

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.

Mr. Smyth: They say there was no sign-board there. The reason of your Honor's ruling before was that it did not then appear but what something might have happened after the accident. Now,

we have the railroad's position made clear; they claim that nothing happened to the bell after the accident.

213 CHARLES PEITZNER, a witness in behalf of the defendant, resuming, testified as follows:

Redirect examination by Mr. Cannon:

Q. Have you any memorandum as to when you first sent crossing signs to Sloatsburg referring to crossing bells being out of order?
A. Yes, sir.
Q. When was it?
A. October 6th, 1909.
Q. What is that paper which you hold in your hand?
A. This is the notice that I sent the agent that I had forwarded four signs reading, "Bell out of order," for use on bells on crossings west of stations.

By Mr. Smyth:

Q. To whom?
A. The station agent at Sloatsburg.
Q. Did he need four?
A. For two bells, yes; there are two crossings west of there and his receipt thereon for the same.

By Mr. Cannon:

Q. When did you send those crossing signs?
A. October 6th.
Q. Did you use crossing signs before that time of that sort?
A. No, sir; that is, not in that territory. There were several sent out in August of the same year; that is, at this end of the territory.

Recross-examination by Mr. Smyth:

Q. I suppose that these bell signs have to be renewed once in a while?
A. There was never any in existence until this time.
Q. I didn't ask you that.

Mr. Smyth: I move to strike that out as unresponsive.
214 The Court: Strike that out.
The Court: Answer the question, witness.

Q. They have to be renewed?
A. Never had occasion to renew any unless lost.
Q. They might get lost or broken and have something happen to them, and then you send out new ones?
A. Never have had any occasion up to the present time.
Q. You say they were using these signs reading, "Bell out of order," on other sections of the road than this particular section?
A. They were not using them at any place until the first month I sent them out, which was in August, 1909.
Q. Were the bells under your jurisdiction?

A. I was to see they were in working order; yes.
Q. Describe the sign that was used.
A. At that time they were a wooden sign, I should judge about three feet and maybe a little longer, by about eight inches wide, reading, "Bell out of order."
Q. Now, was it suspended from the bell, or where was it placed?
A. Well, the instructions were to place them on a nail which was driven in the bell post.
Q. These four signs there were sent in October, 1909, were sent to cover what crossings?
A. The two crossings west of Sloatsburg station, Haverstraw road and the next crossing just above a short distance.
Q. Would you need more than one sign for each bell?
A. Two signs for each bell.
Q. You would need two signs?
A. One facing each way; yes.
Q. So that anybody coming along could see it either way?
A. Yes; so they could see it either way.
Q. What was the necessity of sending out these signs in October?
A. There was an order issued by the superintendent of maintenance of way that those signs must be furnished for each bell.
215 Q. Had the bells west of Sloatsburg gotten out of order again?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.
Mr. Smyth: Very well.

By Mr. Cannon:

Q. I understand that the seeing of these signs in October, or thereabouts, in 1909, was a part of the general order of method adopted at that time.
A. General instructions from the superintendent of maintenance of way.
Q. That covered what territory?
A. It took in New York Division.
Q. That is from Port Jervis to Jersey City?
A. From Port Jervis to Jersey City; yes, sir.

WILLIS CLARK, called as witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. What is your business?
A. Track foreman.
Q. Where do you live?
A. I live now at Salisbury Mills, New York.
Q. Where did you live in March, 1909?
A. Sloatsburg, New York.
Q. What was your business at that time?
A. Track foreman.

Q. Track foreman of what?
A. Of the Erie Railroad; I worked for them.
Q. At Sloatsburg?
A. At Sloatsburg.
Q. Describe the section of track that you had charge of.
A. I had from Ramapo to near Tuxedo, about four and one-quarter miles of double track.

216 Q. Were you at Sloatsburg on the morning of March 3rd, 1909?
A. Yes.
Q. When this accident happened?
A. I was.
Q. You did not see the accident?
A. No.
Q. Where was your home, or your house at that time?
A. I lived in the station room. I had rooms right in the station there at Sloatsburg.
Q. When did you first learn that something had happened there?
A. I heard this train No. 48 stop and after it stood there a little while, I went out around to see what the trouble was. It was not used to stopping there, that train, and I walked up towards the crossing.
Q. Did you learn that an accident had happened?
A. I met some trainman back of the rear end of the train and he told me they had struck someone up there, so I walked on up to the crossing.
Q. Do you know what time it was that you reached the Haverstraw crossing?
A. I don't know exactly; it was somewhere around six o'clock. I could not tell exactly.
Q. Did you observe anything with respect to the crossing bell at the Haverstraw crossing when you arrived there, whether it was ringing or not ringing?
A. The bell was not ringing when I arrived there.
Q. What time did you arrive there?
A. About six o'clock. It may have been a little bit after.
Q. How long did you remain there?
A. I was there ten minutes, I should think, first; ten or fifteen minutes, ten minutes, probably.
Q. Did you hear the crossing bell ringing there at that crossing shortly afterwards?
A. Not until about six-fifty-three.
Q. Six-fifty-three that morning?
A. Yes; I came back down to the station then. I went back about six-forty-five and I was there when train No. 38 came down, the east bound train, and it rang all right for that train.

217 Q. The surroundings and conditions at the crossing, the Haverstraw road crossing, were the same in April, 1909, as they were in March, 1909, were they not?
A. Yes; the same.

Cross-examination by Mr. Smyth:

Q. What made you notice the bell was not ringing when you got to the crossing at six o'clock?

A. Well, it was my duty if those bells were out of order, or ever should be, to report them, and I took particular notice; always did that when I was around those crossings.

Q. Was there any reason why you took particular notice this day?

A. No more than any other day, as I know of, only I always did. I made it a rule.

Q. You remember distinctly noticing that the bell rang when train No. 38 came at six-fifty-three?

A. Yes.

Q. You say the bell did not ring up to that time?

A. Not while I was there.

Q. You were there at six o'clock.

A. A trifle after but it might have been a little after; I don't know exactly the time, but in the neighborhood of six o'clock.

Q. How long did you stay there?

A. Probably ten minutes or something like that.

Q. Did you go back then?

A. I went down to the station.

Q. What was the situation down at the station?

A. Well, No. 48 had gone.

Q. What?

A. Train No. 48 had gone when I got back down to the station and I saw the front part of the wagon lying down east of the station.

Q. Was there any train down there?

A. Not at that time.

Q. Was there any train standing at the station on the west bound track?

A. I didn't notice any.

218 Q. Was there any when you came out after hearing No. 48 stop at the station?

A. At first?

Q. Yes.

A. When I went up I didn't notice any.

Q. Did you notice any train west bound stopping at the station between the time you heard No. 48 stop until No. 38 went by at six-fifty-three?

A. I didn't notice any.

Q. You were there all the time, weren't you?

A. I was in the station; I lived there. I went in and got my breakfast and when I came back out, these trains had gone, I suppose.

Q. You got breakfast after you went to the crossing?

A. I got breakfast after I went to the crossing.

Q. After you had been to the crossing and came back, there was no train standing on the west bound track in sight then, was there?

A. I didn't notice any.
Q. There is a tool house that you kept there, isn't there?
A. Yes.
Q. Where is that tool house?
A. Right across from the station; right opposite the east end of the platform on the west side.
Q. What do you keep in that tool house?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.
The Court: Overruled.
Mr. Cannon: Exception.

A. We keep all of our necessary tools for track repairs, our hand cars and so forth.
Q. Do you also keep signs that are put on the bells when they are out of order—don't you?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.
Objection overruled.
Mr. Cannon: Exception.

219 By Mr. Cannon:

Q. Is this at the time of the accident that you are referring to?
A. We didn't have any boards at the time of the accident.

By Mr. Smith:

Q. You heard counsel for the road ask about the time of the accident. Has the matter whether there were signs there or not been discussed between you and anybody recently?
A. No.

Mr. Cannon: Same objection.
The Court: Same ruling.
Mr. Cannon: Exception.

A. No.

Mr. Cannon: I move to strike out the answer.
Motion denied.
Mr. Cannon: Exception.

Q. Have you made any statement to the road at all about the bell ringing?
A. I did; yes.
Q. When?
A. About a week ago last Tuesday.
Q. Was that the first that anybody had spoken to you whether the bell was ringing on the Haverstraw crossing on the 3rd of March, 1909?
A. Yes.
Q. Nearly five years ago?
A. Nearly five.
Q. What?

A. Yes.
Q. Has it been the matter of remark in any way or conversation in any way between the day the accident happened up to a week ago when somebody from the railroad asked you about it?
A. No.
Q. Have you thought about it during those nearly five years?
A. I have thought of it myself; yes.
Q. Did you speak to anybody about whether it rang or not?
A. No.
220 Q. When did you first know that there was a claim made that the bell was ringing continuously?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.
The Court: Overruled.
Mr. Cannon: Exception.

Q. When did you first know that there was a claim made that the bell was ringing continuously?
A. About a week ago.
Q. Why had it been a concern of yours in the meantime, from the day the accident happened down to a week ago?
A. I heard the remark made around there that day, something concerning the bell, sometimes it rang.
Q. What day?
A. The day of the accident, by other parties around there.
Q. You heard the remark made that the bell rang continuously?
A. No; not exactly that. I heard them make the remark that it rang all the while and sometimes it did not ring at all.
Q. Who made that remark?
A. Some of the residents there of Sloatsburg; I don't know who they are now.
Q. The residents of Sloatsburg?
A. Yes.
Q. Sort of a notorious bell in Sloatsburg, wasn't it?

Mr. Cannon: I object to that.
Objection sustained.

221 THEODORE G. WOOD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Von Bernuth:

Q. Where do you reside?
A. Port Jervis.
Q. What is your business?
A. Locomotive engineer.
Q. With the Erie Railroad Company?
A. Locomotive engineer with the Erie Railroad Company.
Q. Was that your position in March, 1909?
A. Yes.
Q. On March 3rd, 1909, do you know what train you were on in the morning?

A. Train No. 75, west bound.
Q. What kind of a train was that?
A. Fast freight.
Q. Do you recall that morning approaching Sloatsburg station?
A. Yes.
Q. Relate what happened after you left Sterlington and before you reached Sloatsburg.
A. I went up to a tank above Sterlington and got a tank of water there.

By Mr. Smyth:

Q. Above Sterlington?
A. Yes, sir.

By Mr. Von Bernuth:

Q. When you say that, you mean between Sterlington and Sloatsburg?
A. Between Sterlington and Sloatsburg, just after I had started from the water tank a trainman from train No. 48 came down and flagged me and came on my engine and notified me there was an accident at Sloatsburg. I pulled up just below Sloatsburg station and stopped at the scene of the accident.
Q. Did this man notify you of the accident before or after you left the tank?
A. Just after I left the tank.
222 Q. You had already started up?
A. Yes.
Q. Did you proceed slowly or fast up to the station?
A. I proceeded slowly up to the station.
Q. You stopped where?
A. Just below the station.
Q. When you say just below, do you mean just east or west?
A. Just east.
Q. Where was train No. 48 at that time?
A. Standing there. I stopped just opposite their engine, or a little above.
Q. Did you stay there until after No. 48 left?
A. Yes.
Q. How long was No. 48 there while you were standing there at the Sloatsburg station?
A. I would not say. I don't exactly remember, but I should imagine at least five minutes.
Q. You say it was at least five minutes?
A. Yes.
Q. What happened after No. 48 left and before you started?
A. I called my flag.
Q. What is that?
A. A flagman, that as I supposed had gone out to protect the rear end, when I stopped there, so I called him in and received a signal to go and started.

Q. How long a period of time elapsed after No. 48 left before you left?
A. Oh, from three to five minutes.
Q. Then you started up?
A. Yes.
Q. And went west?
A. Yes.
Q. Did you go slow or fast?
A. Well, better than the average freight train, making about the average time.
Q. You had to start upgrade there?
A. Yes.
Q. That upgrade continues until a point west of the Haverstraw crossing?
A. About midway between that portion and the crossing above it and there the grade changes and is not so heavy.

223 Cross-examination by Mr. Smyth:

Q. This tank where you were is near Sterlington, you call it the Sterlington tank?
A. No; it is the Sloatsburg tank.
Q. You called it the Sterlington tank. Why did you do that?
A. I think not.

(Testimony of the witness on direct examination referred to read by the stenographer.)

Q. How far above Sterlington is the tank?
A. About midway between there and Sloatsburg.
Q. What is the distance between Sterlington and Sloatsburg?
A. A little short of a mile.
Q. So the tank is about half a mile away from Sloatsburg?
A. Hardly that; yes.
Q. About half a mile?
A. No; it is not half a mile from Sloatsburg.
Q. You say not hardly half a mile. How much is it?
A. I should say about 1,500 feet.
Q. Had you actually started when the flagman from No. 48 reached you?
A. Yes.
Q. How far had you gone?
A. I could not say exactly.
Q. Had you done more than to simply turn the engine over?
A. Yes; I had got the engine under slow headway.
Q. Had you gone as far as fifty feet?
A. Perhaps.
Q. Is that the best answer you can make?
A. Well, one would not impress it in their mind for five years—you would not remember, would you?
Q. I would not either, but I am talking about railroad people?
A. I did not, either.

Mr. Cannon: I object to that remark.

The Court: I don't recognize the force of your objection
224 unless you accompany it with a request to instruct the jury to disregard it. I do so anyway.

Q. It is true, is it not, that you had practically just about started when the flagman reached you?

A. Yes; practically just started.

Q. What time was it, do you remember?

A. I don't remember exactly, but Mr. Padien said from the sheet that we passed the tower at six-fifty-six.

Q. At six-fifty-six?

A. At five-fifty-six.

Q. That would be the Sterlington tower?

A. Yes.

Q. Can you estimate from that about what time it was when you reached Sterlington?

A. When the flagman got on?

Q. No; when you reached Sloatsburg?

A. About ten minutes later.

Q. That would be about six minutes after six?

A. Yes.

Q. Then you were stationary at Sloatsburg about how long?

A. At least five minutes, I think.

Q. Five minutes more, so that would account for about fifteen minutes?

A. Yes.

Q. Then you went away?

A. About No. 48 left.

Q. After No. 48 left?

A. Yes.

Q. About three minutes after No. 48 left you went away; is that right?

A. Yes.

Q. You went away faster than the ordinary freight goes?

A. Yes.

Q. You were an express freight?

A. Yes.

Q. So that you probably cleared Haverstraw crossing by ten minutes to six, didn't you?

A. Not very easily, no.

Q. A quarter after six?

A. Well, if I arrived at the station at six-five and laid still five minutes, and No. 48 left, and then used three minutes more, that would be eighteen minutes, so I could not see how I could leave there at fifteen; it would be at least fifteen or later.

225 Q. No. 48 left Sloatsburg, then, about how long after six o'clock?

A. Around six-ten or six-twelve, somewhere there.

Q. Well, we can figure that out ourselves?

A. I would call it about twenty-three minutes.

Q. But until ten minutes after, which would be twenty-eight minutes?
A. Yes.

By Mr. Von Bernuth:

Q. You say you arrived at Sloatsburg at six-five, you mean at the station where you stopped?
A. Yes.

JOHN J. MEANY, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Von Bernuth:

Q. What is your business?
A. Conductor.
Q. Where do you reside?
A. Port Jervis, New York.
Q. What was your business in 1909, in March?
A. Flagman on extra 1843.
Q. Were you flagman on extra 1843 on the morning of March 3rd, 1909?
A. Yes.
Q. Who is your engineer?
A. William McKim.
Q. Who was the conductor?
A. Samuel Curry.
Q. Do you know whether Samuel Curry is alive or not?
A. He is dead.
Q. You were flagman on that train, were you?
A. I was; yes, sir.
Q. Do you keep any records of the cars in that train?
A. Yes, sir.
Q. How many cars did you have on extra 1843 as you approached Sloatsburg on the morning of March 3rd, 1909?
A. Twenty-six; seventeen loads and nine empties.
226 Q. You know where the tank is between Sterlington and Sloatsburg?
A. I do.
Q. Did you stop at that tank that morning?
A. Yes, sir.
Q. Do you know at what time you passed through there?
A. About six-forty-five to six-fifty, along there.
Q. At the tank?
A. Yes.

By Mr. Smyth:

Q. Which way were you going?
A. West.

By Mr. Von Bernuth:

Q. Which way was your train going?

A. Westward.
Q. Do you know how long you stood at the tank?
A. About ten minutes.

WILLIAM J. MCKIM, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Mr. Smyth: I will stipulate he will testify the same as Mr. Meany.
Mr. Von Bernuth: He is going to testify to a little bit more.

Direct examination by Mr. Von Bernuth:

Q. What is your business?
A. Engineer.
Q. Of the Erie Railroad Company?
A. The Erie Railroad Company.
Q. How long have you been employed by the Erie Railroad Company?
A. Twenty-seven years, about.
Q. Were you employed by the Erie Railroad Company as an engineer on March 3rd, 1909?
A. Yes.
Q. You were the engineer of extra 1843 on that morning, were you not?
A. Yes.
227 Q. It appears in the evidence that extra 1843 passed FJ tower at Sterlington at six-thirty-nine; that the train stopped at the tank and took water and remained there about ten minutes, and that extra 1843 later passed XK tower at West Tuxedo at seven-fifteen. Based on your experience as an engineer, will you state about what time you passed Haverstraw crossing at Sloatsburg?
A. Probably about seven o'clock.
Q. Around that time?
A. Around seven or seven-five.
Q. After leaving the tank, can you say whether you proceeded fast or slowly up until you got to the point west of the Haverstraw crossing?
A. Slow; it was upgrade.
Q. It is a light or a heavy train, twenty-six cars, seventeen being loaded and nine empty?
A. Under some conditions, sometimes it is heavy.
Q. It is a medium heavy train?
A. Medium.

Mr. Smyth: No cross-examination.

(Witness excused.)

FREDERICK D. PANGBORN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. What is your business?
A. Photographer.

Q. How long have you been a photographer?
A. About eleven years.
Q. Have you been engaged in the business of photography during that time?
A. Yes, sir.
Q. You are engaged in commercial photography, so-called?
A. Yes.
228 Q. You are sometimes employed by the Erie Railroad to take photographs and pictures for it, are you not?
A. Yes.
Q. I show you Plaintiff's Exhibit No. 2 and I ask you if you can tell from that picture where the camera stood when the picture was taken?

(Witness examines photograph handed him by counsel.)
Mr. Smyth: Does it need an expert for that?
Mr. Cannon: With respect to the site of the picture I am asking him.

The Witness: You mean what position on the ground it stood?
Q. What position on the ground it stood, yes?
A. It appears to stand on the left-hand side of the road.

Mr. Smyth: The man who took it has already said that. I submit we cannot have anything better than the man who did it himself, and he was called by the defendant. Why take up time with an expert photographer?
The Court: That would appear to be the best evidence. What do you want with this?
Mr. Cannon: I want to show by this photograph that upon its face it appears it was made from the gutter or ditch in the road. In other words, that the center of the picture is the place where the camera stood and that is necessarily true.
Mr. Smyth: We have had the photographer who says it was in the left-hand wheel track that it stood.
The Court: I don't see the purpose of it, but we will take it.
Objection overruled. He may answer.

229 The Witness: I don't think it is taken in the wheel track; no, sir.
Q. Where is it taken?
A. It appears to be taken in the center of what is a sort of a path alongside the road. It is taken right in the center of that path.
Q. The center of a picture is in line with the position of the camera, isn't it?
A. Always; yes.

By the Court:

Q. Were you ever at this place?
A. Not that I remember; no sir; not for photographic purposes.
Q. You state your opinion against the personal knowledge of a man who took this photograph?
A. Yes, sir; that is my opinion.

Q. You think you know more about it than the man who actually took the picture?
A. In a case of that kind, I think I know as much.

By Mr. Smyth:

Q. You are an Erie Railroad expert, aren't you?
A. Not altogether. I do work for other concerns.

SANFORD CONKLIN, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Where do you live?
A. I live at Spring Valley.
Q. What is your business?
A. I am working on a farm, hard labor.
Q. Where did you live in March, 1909?
A. I lived in Sloatsburg.
Q. What did you do up there?
A. I drove a team.
Q. For whom?
A. For Austin Conklin.
230 Q. It has been testified to upon the deposition of William Hahn or Hand, as it is called, that you and he were living in the same place in March, 1909?
A. Yes.
Q. That is a fact, is it not?
A. Yes.
Q. Where did you live?
A. I lived with Mr. Phillips. I boarded there at that place, at Mr. Phillips'.
Q. You boarded there?
A. Yes.
Q. And Hand or Hahn boarded there, too?
A. Yes.
Q. What kind of work did you do for this man Conklin?
A. Drove a team for him, drawing fertilizer and stuff to the farm.
Q. Do you remember the morning this accident occurred at what we call the Haverstraw crossing on the Erie Railroad?
A. (No response.)
Q. Do you remember the morning of the accident occurring there?
A. Yes.
Q. About what time did you leave your house, or the house where you lived, that morning?
A. About half-past five.
Q. Did Hand or Hahn leave before you or after?
A. He left after I left.
Q. You started out?
A. Yes.
Q. Where did you go?

A. I went around the road and he came on the railroad.
Q. That is, you went up the highway?
A. Yes.
Q. The highway on the south side of the track?
A. Yes.
Q. You say Hahn went up the railroad?
A. Yes.
Q. You had started out ahead of him?
A. Yes.
Q. Did you come up to the Haverstraw crossing that morning?
A. Yes, sir.
Q. Did you go over it?
A. Yes.
Q. After you had gone over the crossing of the Haverstraw road, tell what you saw, if anything, with respect to the accident.
A. After I had went by, there came a freight train up,
231 after I had went by, and after I got across, I walked up in front of this cottage and stood there and there was coming the passenger train down at that time.
Q. Did you see the passenger train coming?
A. No; it hooted—I did after the whistle blew.
Q. What do you mean by hooted?
A. The whistle blowing.
Q. You heard the whistle blowing?
A. Yes.
Q. How far were you from the crossing then?
A. About fifty feet.
Q. Did you keep on going?
A. No; I stopped and was watching the train when she went down.
Q. What did you see happen, if anything?
A. I seen this fellow after the train had hooted; I turned my head and looked down and this fellow came right upon the track, and his horses, his front feet was over the east rail when the train hit it; it picked up the horses and wagon.
Q. Did you see him before he was struck?
A. I seen him just the second before he was struck.
Q. What was he doing then?
A. He stood with his back towards the eastbound train rolling a cigarette.
Q. Did you notice anything with respect to the reins or lines?
A. The line was in the foreboard of the wagon.
Q. By the foreboard you mean the piece across the front?
A. The dashboard.
Q. The dashboard?
A. Yes, sir.
Q. You were subpœnæd by the defendant to come to this court and testify, were you?
A. Yes, sir.
Q. After the accident happened what did you do?

A. I just walked back a few steps and I looked to see whether the man was killed and turned and went on to my own work.

Q. You did not go away back to the crossing, did you?

A. No; I did not.

232 Q. Where did you go further on?

A. I went right on to Austin Conklin's place and took care of my team.

Q. Did Hahn come up shortly afterward?

A. Yes.

Q. How long afterward did Hahn come?

A. About a half hour.

Q. Did you see a passenger train come from the west?

A. Sir?

Q. Did you see the passenger train before it got to the crossing or did you notice it?

A. Before it struck the team?

Q. Yes.

A. Just the second before.

Cross-examination by Mr. Smyth:

Q. When did anybody see you from the railroad?

A. I don't know as anybody seen me at all.

Q. Nobody?

A. I don't know as anybody seen me at all, there.

Q. At any time since then did anybody from the railroad call upon you or did you call upon them?

A. Why, nobody had not called upon me.

Q. When did you know you were going to be a witness here?

A. It was here the other day when a man come up and got my affidavit.

Q. When was that?

A. I could not tell you exactly when it was.

Q. Was it a day or so ago?

A. It has been two or three weeks ago.

Q. Somebody from the railroad came and got your affidavit two or three weeks ago?

A. Yes.

Q. Where did he come?

A. He come up here where I live now, up at Spring Valley.

Q. Did you lose any time that you got paid for at all?

A. No, sir; I did not.

233 Q. How did they know your address?

A. Hahn was the one that put them there, put them on track of me.

Q. When did you see Hahn last?

A. I have not seen Hahn in very near a year.

Q. When have you communicated with Hahn to let him know your address?

A. I have not communicated with him at all, only just as I passed him on the road.

Q. When did you last pass him on the road?

A. It has been about eight months ago.
Q. Did you talk to him then?
A. No, sir; I did not.
Q. Did you ever tell him what your address is?
A. I never told him what my address was.
Q. You never told him?
A. No, sir; I did not.
Q. How did the railroad come to find your address?
A. I don't know how they found it. I worked on the railroad this spring, and I suppose they took it from my time.
Q. What railroad did you work for?
A. I worked on the Erie.
Q. When did you work for the Erie?
A. This spring.
Q. When did they take you on?
A. They took me on in May or June, somewhere around there.
Q. How long did they keep you?
A. They kept me till this fall, this first fall month.
Q. This first what?
A. This first fall month.
Q. September or October?
A. 1st of October.
Q. What work did you do for the Erie Railroad Company between June and October?
A. Pick and shovel and tamp ties and all such as that.
Q. Did you tell anybody then that you had seen this accident?
A. No, I did not.
Q. Did you tell anybody before that that you had seen it?
A. Nobody only Mr. Waldron.
234 Q. You told Mr. Waldron?
A. Yes.
Q. Mr. Waldron is in court. Do you see Mr. Waldron there (indicating)?
A. Yes, sir.
Q. When did you talk to him?
A. I talked to him a day or two after the accident.
Q. What did you tell Mr. Waldron?
A. I told him that I see it.
Q. What did you tell him besides that?
A. That is all I told him. I told him I had seen it.
Q. Did you tell him the man was standing in the wagon with his back toward the oncoming train rolling a cigarette?
A. No, sir.
Q. Did you tell him you heard the whistle hooting?
A. No, sir; I did not.
Q. How did you come to tell Mr. Waldron that you saw the accident?
A. We were talking about it.
Q. Was it the same day as the accident?
A. It was a day or two after.
Q. You never told anyone else but Waldron?
A. No.

Q. You never told a single soul from the time the accident happened, that you saw this man who was killed standing in his wagon with his back to the oncoming train, rolling a cigarette, while the whistle was tooting?

A. No, sir; I did not.

Q. You say you saw that?

A. Yes.

Q. You saw the man who was killed?

A. Yes.

Q. Why didn't you go down and help him and see if there was anything you could do?

A. I went down close enough to see whether he was killed or not.

Q. Where were you?

A. I stood just alongside the edge of the track.

Q. How far away from the crossing?

A. (No response.)

Q. Do you repeat in the presence of Mr. Waldron that you ever told him you saw the accident—stand up, Mr. Waldron?

A. I stood right on——

235 Q. No, answer my question. Do you repeat under oath, before these gentlemen, that you ever told Mr. Waldron you saw the accident?

A. Yes.

Q. Look right at Mr. Waldron?

A. Yes, sir.

Q. What did you tell him?

A. I said I was there and saw it.

Q. Who was present besides Mr. Waldron when you said it?

A. Will Hand.

Q. Where was Hand when the accident happened?

A. Hahn said that he were——

Q. Where was Hahn at the time the accident happened?

A. On the train.

Q. On the train?

A. Yes.

Q. At the time the accident happened?

A. Yes.

Q. You saw him on the train?

A. I did not see him.

Q. Which train?

A. On the freight.

Q. Where was the freight when this accident happened?

A. Just crossed over the crossing.

Q. What was he doing on the train after it crossed over the crossing?

A. He was fixing to get off it.

Q. Did you see him do that?

A. No, I did not see him get off it.

Q. Show us, if you can, on Plaintiff's Exhibit 2, where you say you were standing at the track?

A. I stood right up along here (indicating).

Q. Just mark it with a pencil?
A. Right here by this big rock.
Q. Put the letter "C" right exactly where you stood?
A. (Witness marks on Exhibit 2.)
Q. Then you were standing out in the roadway, were you?
A. Yes.
Q. And Hahn was not in sight?
A. I did not see him.
Q. Did you wait for him to get off this freight?
A. No, I did not.
Q. Did you know this man who was killed?
A. I knew his first name but I didn't know his last name.
236 Q. Did you know the man?
A. I know his first name.
Q. Did you know the man?
A. No, sir.
Q. Did you ever speak to him?
A. I have spoken to him.
Q. How long had you known him—long enough to speak to him?
A. Very near two years.
Q. During that time were you in the habit of seeing him daily?
A. Yes.
Q. Did you work for Waldron, ever?
A. Yes.
Q. At the same time that this man did?
A. No.
Q. You were in the habit of seeing him daily for two years?
A. Yes.
Q. The man whom you had seen daily and spoken to for two years, you saw struck down by a train, and you went away without going to see what really happened?
A. I went up close enough to see whether the man were dead or not.
Q. All the other people who heard about the accident congregated there, you were the only exception in Sloatsburg to walk away from the accident; is that so?
A. I really had to.
Q. Why?
A. To take care of my own rights?
Q. What were your own rights?
A. I had to go to take care of my work.
Q. What about it?
A. I was driving a team and I had to go there and to get them out of the stable to get them at work.
Q. Would it have made any difference if you had spent five minutes to see if any help could have been given to the man you had known for two years, who had been struck down by a train?
A. I don't think it would, if I could have done any good by going back.
Q. Was the subject of this man being killed talked of in the village after that?

A. I never talked about it.

237 Q. You heard others?

A. I have heard others talking about it.

Q. You heard others talk about it when you were present?

A. Yes.

Q. You did see the whole thing and knew the man was to blame and yet you kept your mouth shut about it; is that true?

A. I didn't say anything about it because I didn't want to mix up or look for any trouble of anything like that. I was attending to my own business.

Q. What was the first thing the Erie man said to you when he found you at your place two or three weeks ago?

A. He asked me if I knew anything about it.

Q. Is that all that he said?

A. I told him. I told him what I knew about it.

Q. Why had not you said that before to somebody during the nearly five years that had elapsed?

A. Nobody ever asked me anything about it.

Q. You heard about Hahn knowing about it?

A. Yes, I heard about Hahn knowing about it.

Q. Hahn told you about what he saw?

A. He told me some part of it.

Q. He told you that he saw this train coming down and no whistle blew, didn't he?

A. He never told me anything like that.

Q. Where did Hahn say he was when he told you about it?

A. He said he *were* on the hind end of the train.

Q. He said he was on the hind end of the train?

A. The hind end of the freight.

Q. When the accident happened?

A. Yes.

Q. How far away was the hind end of the train from the crossing when the accident happened?

A. I could not say how far away.

Q. You say you were there. Can't you tell us?

A. I was there, but I did not take notice to see how far

238 away the train was from the crossing, but it was over the crossing.

Q. Was it one hundred feet away?

A. I couldn't say. I don't know how far it was.

Q. What?

A. I don't know how far it was.

Q. It was a much greater distance than from where you sit to the other side of this court room, wasn't it?

A. I can't say that, because I did not take notice of it enough to swear how far the train was over the crossing, but I knew it was over the crossing.

Q. When you saw the passenger train what part of the passenger train did you see at once when you first saw it?

A. It was the engine.

Q. The whole of the engine?

A. Yes.
Q. Didn't you see the first car?
A. You could not see it, only just the tops of that.
Q. You saw the whole of the engine?
A. I seen the engine, the stack and the steam chest on the top and the whistle, I could see that.
Q. Yes.
A. And the cab.
Q. Did you see any other part of the engine than the top of the steam chest and the top of the cab?
A. I seen the boiler.
Q. Did you see the boiler around the end of the freight or over the freight, or how?
A. Over the freight.
Q. Then the top of this engine was higher than the tops of these box cars?
A. Just so you could see the top of it, merely the top of it.
Q. Did you see the cowcatcher?
A. No, I did not see it.
Q. Did you ever see the cowcatcher?
A. I seen it after it went by the freight.
Q. When the cowcatcher went by the freight it was by the crossing then?
A. Right up in the direction of the horses.
239 Q. Near the horses?
A. Yes, sir.
Q. That is the first you saw of it?
A. That is the first I saw of the cowcatcher.
Q. How were the horses going when you first saw them?
A. They were walking, walking right on across the track.
Q. When you first saw the horses were they walking steadily?
A. Right steadily, right along.
Q. You did not see the horses until they were just stepping on the track at the crossing, did you?
A. I saw them when they were coming right up on the track.
Q. Did you see the horses step over the first rail?
A. No, sir; I did not. I saw them when they stepped over the last rail on the east bound track.
Q. They were stepping along easily then?
A. Yes.
Q. The reins were not in the man's hand?
A. No, sir; they were lying down on his dashboard.
Q. The train was just about striking him?
A. Yes.
Q. And the man was standing there calmly rolling a cigarette; is that right?
A. Yes.
Q. Nobody was disturbed?
A. I didn't see nobody.
Q. The horses did not seem frightened?
A. No.

Q. They were going to take their death easily, as Mistschook took his, to your mind?
A. Yes.
Q. Did you ever see horses act like that before?
A. Yes, I have. I have seen horses where they would not hardly move off of the track.
Q. That is where they are frightened so that they cannot move?
A. I have never seen anything frightened up there like that.
Q. What do you mean by that, that horses take these crossings calmly anyway?
A. The horses have not got life enough to them for to get across of it, that is what I mean.
240 Q. These two horses?
A. Them two horses, them two horses were older than I am.
Q. They are older than you are?
A. They were older than I am.
Q. They were at that time?
A. Yes.
Q. A little matter of an express engine of the Erie Railroad would not frighten them?
A. I don't think it would.
Q. Did the horses turn around and look at the engine and pick up their ears?
A. No, they did not. They did not have time to do anything.
Q. You were looking all the time, weren't you?
A. I was looking at the train, I followed the train, I was watching the train when it went down.
Q. The freight train?
A. Yes, sir.
Q. Yes?
—. ——. The passenger coming down and the freight was going up and I watched it until it struck the horses.
Q. You watched the train until it struck the horses?
A. I watched the train until it struck the horses and wagon.
Q. You were watching the passenger train?
A. I was watching the passenger train until it was pretty near up on the horses, and I was just in time for to cast my eyes over at him and he had the cigarette that way.
Q. For how long a time were you watching the passenger train before the cowcatcher picked up the horses?
A. Just a few seconds.
Q. How many?
A. I couldn't say just how many, but a few seconds.
Q. Was it as many as five or ten seconds?
A. I could not say.
Q. You were there—at least you say you were. What is your recollection?
A. I would dare say eight seconds, anyway.
Q. Eight seconds?
A. Yes.

241 Q. Do you know what eight seconds is?
A. Yes.
Q. During all that time you were watching the passenger train?
A. I was watching the passenger train coming down.
Q. How far away was the passenger train when you first saw it?
A. About one hundred yards up the track.
Q. One hundred yards up the track?
A. Yes.
Q. How much of the passenger train did you see coming down?
A. I seen the engine, the top part of the engine when it was coming down.
Q. Was it only the top part of the engine you saw?
A. Yes, until it got down very near even with you.
Q. What was it that called your attention to the top part of the engine of the passenger train?
A. I was watching the steam when it were flying out of the——
Q. You mean the whistle—say is—is that it?
A. Yes.
Q. Who told you to say that?
A. Well, it was the whistle, you just said so. You said just what I was going to say.
Q. But you were going to say it before I said it.
A. Yes.
Q. Who told you to say it?
A. Nobody.
Q. Who was the man who saw you two or three weeks ago?
A. I don't see the man here at all. I don't know him.
Q. Has he been here during the trial.
A. I could not say that.
Q. Are you stopping over here in New York between the days of the trial?
A. Yes.
Q. Where?
A. I have been over to the office over here.
Q. You have not slept there. Where have you slept?
A. I have slept home.
Q. You have gone home every night?
A. Yes.
242 Q. Where did you say you lived?
A. I live up in Spring Valley.
Q. Who are you working for now?
A. I am working for Mr. Spears.
Q. Is he a farmer?
A. Yes.
Q. Have you had any time paid for since two or three weeks ago?
A. I have not.
Q. Do you expect any time to be paid for?
A. No, sir; I do not.
Q. Do you expect this railroad to take up your time and not pay you for it?
A. When a subpœna comes to you if you are a mind to take it,

it is up to you to get here. You have to get here whether you get your money or don't.

Q. Did you get your money?

A. No, sir; I did not, nothing only what come with the subpœna.

Q. What came with the subpœna?

A. $3 with the subpœna.

Q. Has that been more than once?

A. That has been twice with the subpœna. I have had two subpœenaes now.

Q. How many days have you been here?

A. Two, with today.

Q. Friday and Monday?

A. Yes.

Q. How long had you lived in Sloatsburg at the time this accident happened?

A. Before it happened?

Q. Yes.

A. About five years.

Q. Who had you worked for up there?

A. Jacob Waldron and Mr. Benton Waldron and John Waldron and Mr. Ashmore Waldron.

Q. What work did you do during that time?

A. Driving a team.

Q. Did you ever work for the Erie Railroad, except last summer and fall?

A. Yes, sir.

Q. When did you work for them before that?

A. I could not say just exactly when it was I worked for them before.

243 Q. How many times have you worked for them?

A. I have worked for them twice.

Q. Do you remember when the first was?

A. No.

Q. Was it before the accident or since the accident?

A. Before the accident.

Q. How long before?

A. I could not say how long before that.

Q. Who did you have who worked for the Erie Railroad in Sloatsburg?

A. Donnelly.

Q. Who is Mr. Donnelly?

A. Patsy Donnelly.

Q. Who is Patsy Donnelly?

A. He is the agent there.

Q. The station agent?

A. Yes.

Q. How well did you know him?

A. I know him because I had seen him enough and he used to move my furniture from Eagle Valley over, and got acquainted with him that way.

Q. How do you mean, he moved your furniture?

A. He moved it on his wagon, his man and team moved it for me.
Q. Yes.
A. That is how I got acquainted with him.
Q. Who else did you know who was employed by the Erie Railroad?
A. Mr. Clark.
Q. Who is Mr. Clark?
A. He is the section boss.
Q. He is the track foreman who has been on the stand here?
A. Yes.
Q. Did you work under Mr. Clark?
A. No.
Q. How well did you know Mr. Clark?
A. I know him for I had seen him.
Q. What?
A. I had seen him up close enough to speak to him; to say how do you do, and so forth.
Q. Did you ever talk to him about seeing this accident?
A. No, sir; I never did.

By the Court:

Q. Did you ever know there was a coroner's inquest held in connection with this accident?
A. No, sir; I did not.
244 Q. Did you ever hear about it?
A. No, sir; I did not.
Q. Did you ever know the name of the engineer?
A. I did not.
Q. Who was on the passenger train?
A. No, sir; I did not.
Q. Did you ever see an accident before—a railroad accident?
A. No, sir; I have not.
Q. Were there any other persons there at the crossing when you went away?
A. No, sir; there was not; not that I seen.
Q. How long after that was it that you first spoke with anybody about the accident?
A. After William Hahn had come up there.
Q. Come up where?
A. He came up where we were working for Mr. Conklin.
Q. On that same day?
A. Yes.
Q. At what time?
A. It must have been half-past seven.
Q. What did he say?
A. He said that he see it.
Q. Is that all he said?
A. He told me he had seen it. He said he was on the hind end of the freight train when it went up, and he said that he had taken the trouble to go all the way back to help him. He helped Mr. Warren Waldron there with him.

Q. Did he know you saw it too?
A. He did not know until after I had spoken to him about it.
Q. Then you told him you had seen it?
A. Yes.
Q. Did he ask you why you did not go back to help?
A. No, he did not.
Q. Is that all he said to you about it?
A. That is all he said to me. He went on to his work and I came back with the team; we did not get in no conversation no more.
Q. Nothing said about whose fault it was?
A. No, sir; he didn't. He didn't say.
245 Q. Why didn't you tell him at that time what you saw, that the man was rolling a cigarette?
A. I did not tell him anything at all about it, because I did not want to mix up into it.
Q. Just explain what you mean, you did not want to mix up in it.
A. I didn't want to be troubled with it at all, because I have all I can do to take care of my wife and myself.
Q. What kind of trouble was it that was in your mind that you did not want to get into?
A. I did not want to bother with it because it was a whole lot of trouble and makes a good many hard feelings and all such stuff like that. If I come in and I see the accident, and it is in the favor of somebody else, or in the favor of another man, why it makes hard feeling some way with me, and then——
Q. Were you very much shocked by the sight of the accident?
A. Yes, sir; I was scared the same as anyone would be.
Q. You were married man at that time?
A. Yes, sir—no, sir I was not, not at that time.
Q. How could you have in mind any trouble, being a married man you did not want to get mixed up in it?
A. Well, I did not want to get mixed up into it because I have not got no education or anything like that, to read and write.
Q. I understood you to say you were a married man and did not want to get mixed up in the trouble, and that was back at the time of the accident. Now, you say you were not married at that time. How long after the accident did you become married; how long after did you get married?
(No response by the witness.)
Q. How long have you been married?
A. I have been married four years.
246 Q. 1909 or 1910—when were you married, don't you remember the date of your marriage?
A. I have been married four years.
Q. When were you married?
A. 1909.
Q. Give us the date?
A. I could not give you the day and date, for I don't know now.
Q. How is it you don't even remember the day of your marriage, and you remember all these little details about the accident so very plainly?

Mr. Cannon: I except to that.

A. I remember that.

Q. Did you make any affidavit while you were in the employ of the railroad company?

A. I did not.

Q. How do you know you haven't made an affidavit?

A. I know I did not make an affidavit for him.

Q. You say you made an affidavit a short time ago.

A. He made all the affidavit himself that I had.

Q. You cannot read or write, can you?

A. No, sir; I cannot.

Q. Did you sign anything at the bottom of this affidavit; did you sign your name?

A. Yes, sir; I did.

Q. You can write your name?

A. Yes, sir.

Q. Or did you make a cross?

A. I write my name. I can write my name.

Q. You do not know what is in that affidavit, though, do you?

A. I know what is in it, if I read it.

Q. Oh, you can read it?

A. Of course, what I said into it, suppose to be in it.

Q. You don't know, if you can't read——

Mr. Cannon: I except to this line of examination.

The Court: Yes. I want to say that the testimony of this witness is very material, and I think the jury is entitled to have his recollection and other qualities tested to the very last degree, so that
247 they may feel that every last particle of his testimony has been extracted from him, and it has been put to the reasonable tests. Let it appear on the record that the Court does not begin any question until after both counsel have finished with the witness.

Q. Where was the man's body when you saw it, with reference to the crossing?

A. It laid over on the east bound track, on the other side of the east bound track.

Q. On the south side of the east bound track?

A. Yes.

Q. How far from the track?

A. I could not say just how far it was. I did not notice it enough for to know how far it was away.

Q. When you came back, did you come south of the crossing?

A. Yes, sir; yes, sir.

Q. You crossed over the tracks and came south?

A. Yes, sir.

Q. How far?

A. I came over to the first rail on the east bound track.

Q. And no farther?

A. And no farther.

Q. That was at the crossing in the roadway over the tracks?

A. Yes, sir.

Q. That was about the point where the engine struck the man?
A. Yes, sir.
Q. You saw his body was thrown?
A. His body was thrown over and he struck in there nearer the telegraph pole and rolled over into a path that went down across from the main road.
Q. Did you see just what happened to the man's body when the locomotive struck him?
A. He just tumbled, that is all.
Q. He was not thrown up in the air?
A. He was not thrown high.
Q. He was pushed forward?
A. He was knocked right over near that telegraph pole.
248 Q. Can't you point out in this room here how far away he was, or how far he was thrown by the engine—was it farther than any distance in this room, or not so far?
A. I could not say.
Q. Was it as far as from here over to that farthest corner that he was thrown?
A. I could not say that.
Q. Was it as far as from here to the stenographer?
A. Further than that.
Q. How much?
A. I could not say.
Q. Give us your best estimate?
A. I could not say how far he was knocked from the crossing.
Q. You can give us your best estimate of it. Take the distance in this court room.
A. I would not say how far, because I don't know how far he was knocked from the crossing, and I would not say.
Q. You know that it was farther than from you to the stenographer? You can say that, can't you?
A. I can say that it is farther than that, but then I could not put it to any extent at all to tell you how far he had been knocked.
Q. Was it as far as from here to the table?
A. Farther than from here to the table.
Q. Was it as far as that?
A. Farther than that.
Q. Was it as far as from here to the railing of the enclosure there?
A. I could not say that, for I don't know.
Q. If you were able to determine whether the man was dead or alive, you must have been near enough to view his body, were you not?
A. I were up just so I could see over his body.
Q. Describe how he lay?
A. He laid right on his back.
Q. On his back?
A. Yes.
Q. Face upturned?
A. Yes.

Q. You saw his face?
A. Yes.
Q. Describe how he looked?
A. He was dead, that is all I could say. He had a few little scars over his face there, little marks.
249 Q. Describe those marks?
A. They were just a little blood sticking out of them, that is all; the blood *were* sticking through.
Q. Were his eyes closed?
A. Yes, sir; his eyes were closed.
Q. Did he have the cigarette in his mouth at that time?

Mr. Cannon: I except to that question.

The Court: You may have an exception to the entire examination, all the questions put by the Court.

Q. Did you see any evidence of a paper or tobacco or of the cigarette around anywhere?
A. No, sir; I did not. I did not look for it.
Q. Were you in Mr. Waldron's employ before Mistschook was—were you working for Waldron before Mistschook was working for him?
A. I could not say—yes, I was; I had worked for him before.
Q. You worked for him before?
A. Yes.
Q. Then he followed you in Mr. Waldron's employ, is that correct?
A. After I had quit from there, I could not say just when he come there, whether he come sooner or later after I had quit.
Q. You never knew him before that, did you?
A. I did not know him at all, I just knew his first name.
Q. You never saw him before he came to Mr. Waldron's employ?
A. No, sir, I did not.
Q. You never spoke to him?
A. Never spoke to him until he came to Mr. Waldron's employ.
Q. How did you come to leave Mr. Waldron's employ?
A. Him and I could not agree together, so I quit and left him.
Q. You were not discharged?
A. No, sir; I was not discharged.
Q. You had a disagreement?
A. Yes, sir: I quit from him and went away.
250 Q. Speak louder, you say you had a disagreement?
A. I quit him and walked away from him.
Q. I understood you to say you could not get along.
A. We could not: we could not make it go.
Q. And Mistschook succeeded you in Mr. Waldron's employ, and followed after you?
A. He followed after me.
Q. What did you do after you left Mr. Waldron's employ?
A. I went to work for Jacob Waldron.
Q. Did you ever have any words with Mistschook?
A. No, sir.
Q. Unfriendly words?

A. No, sir; I never did.
Q. You say that Mistschook was facing toward the railroad station?
A. Yes, sir.
Q. The opposite direction?
A. Yes, sir.
Q. Will you describe how he held his hand—just describe to us yourself, hold up your hand and show us?
A. He had his hand that way (indicating), and he had his cigarette into his hand and was fixing it to wet it.
Q. He did not use both hands?
A. No, sir; he did not.
Q. He had not lit the cigarette?
A. He had not lit the cigarette.
Q. What was he doing — his left hand?
A. I could not say what he was doing.
Q. You say the reins were hanging on the dashboard?
A. The reins were hanging on the dashboard hanging through the lineboard.
Q. He did not have his left hand even on the reins?
A. No, sir; he did not; not as I can see.
Q. What was he doing with his left hand?
A. I could not say what he was doing with his left hand.
Q. Was the — west on that morning?
A. I don't know whether it were or whether it were not.
Q. How old are you?
A. Twenty-five.
251 Q. Twenty-five?
A. Yes, sir.
Q. You were about twenty years old at the time this accident happened?
A. I could not say how old I was when it happened.
Q. Where were you born?
A. I was born in Port Jervis.
Q. When?
A. I don't know that, even.
Q. You don't know that, even?
A. No, sir.
Q. You never went to school?
A. I went to school a while; don't know just how many days.
Q. You don't know just how many days?
A. Not how many days I went to school; I could not say how many days, for I don't know.

The Court: That is all.
Mr. Cannon: I ask that these two papers be marked for identification.
The papers referred to were marked Defendant's Exhibit K for identification and Defendant's Exhibit L for identification.
Mr. Cannon: I now offer in evidence Defendant's Exhibit K for identification, and I offer in evidence also Defendant's Exhibit L for identification.

Mr. Smyth: We do not object to the mode of proof with regard to the consular seal and signature of the vice-consul, but we do object to this document which purports to be the signature of G. Laverote. We do object to that as not being proper proof of that.

I think my friend will concede that he had issued out of this court a commission to take the testimony of the person who purports to have signed that document, and that commission was returned unexecuted, is that right?

Mr. Cannon: That is the fact; it was sent to the United
252 States Consul at Warsaw, Russia, or Odessa, Russia, with instructions to get the testimony of those people. It was returned to us unexecuted, saying he was unable to get their attendance. In spite of that, I think these documents are competent and material under the treaties.

I understand Mr. Smyth concedes the signature of the vice-consul as the signature of the vice-consul connected with the Imperial Consul-General's office in the City of New York.

Mr. Smyth: Yes. I object to the materiality of it and competency, also to the body of the paper, except the signature, and seal of the Russian Consul. That I admit is genuine.

The rest of it, what purports to be a communication to the Consul, I object to on the ground it is not properly proven, and in that respect I call your attention to the concession of defendant's counsel that he issued a commission to try and get the testimony of these people and that the commission was returned unexecuted.

Mr. Cannon: That was done out of abundant caution, my contention being that these documents are properly proven, being signed by the Russian Consulate over the seal of the Imperial Russian Consul's office of this city.

The Court: I don't see any signature other than of G. Laverote, or whatever it is, on the original above.

Mr. Cannon: This is a copy; not the original.

The Court: Objection sustained.

Mr. Cannon: Exception as to the ruling of the Court as to each exhibit.

Defendant rests.

253 BENTON WALDRON, a witness in behalf of the plaintiff, previously sworn, being recalled in rebuttal, testified as follows:

Direct examination in rebuttal by Mr. Smyth:

Q. You know the last witness who was on the stand?
A. Yes, sir; I do.
Q. How long have you known him?
A. A good many years; I think eighteen or twenty years.
Q. He has lived in your community?
A. Well, some part of the time, yes, sir.
Q. For how long a time have you known him in that community?
A. At the time, do you mean?

Q. Altogether?
A. For the past eighteen years, off and on.
Q. Do you know what the reputation of the witness Conklin is, for truth and veracity in that community?

Mr. Cannon: I object to that, as incompetent, irrelevant and immaterial, and as improper in form.
Mr. Smyth: We can show it, as to his common reputation.

Q. Do you know what his general reputation was for truth and veracity in the community?

Mr. Cannon: Same objection.
Overruled.
Mr. Cannon: Exception.

A. Yes, I do.
Q. What is it?

Mr. Cannon: Same objection.
The Court: Same ruling.
Mr. Cannon: Exception.

254 Q. What is his general reputation for truth and veracity?
A. He is not honest or truthful.
Q. That is his general reputation for the last eighteen years?
A. As long as I have known him, yes, sir.
Q. He says that he, in conversation with you, told you that he saw this accident. Did he ever say anything of that kind to you?
A. Never to my knowledge, he never spoke to me about it.
Q. Did you know before today that he ever claimed to have seen the accident?
A. No, sir; I did not.
Q. You did not?
A. No, sir.

By Mr. Cannon:

Q. Mr. Waldron, you looked up this case, did you not, after the accident, your horses being involved?
A. I looked it up?
Q. Yes.
A. Well, not very much, no, sir.
Q. You had a photograph taken?
A. Yes.
Q. Didn't you ask Sanford Conklin what he knew about this accident?
A. Never did, no, sir.
Q. Never talked to him?
A. I never knew that he saw the accident.
Q. Didn't he suggest to you at one time he did see it, when you were making your investigation?
A. No, sir; not to my knowledge.
Q. I am asking about your knowledge. Would you know if he talked to you?

A. No, sir.

Q. Didn't he suggest to you at one time that he did see it, when you were making your investigations—you would know it if he talked to you?

A. Oh, Yes; I would know, yes, sir.

Q. What do you mean by saying, "not to your knowledge"?

A. If he ever spoke to me about it I would have no knowledge of it; that is what I mean.

Q. You mean you have no remembrance of it, is that it?

A. He never spoke to me, to my knowledge.

255 Q. When you say, to your knowledge, do you mean to your remembrance?

A. I mean that, but I have no knowledge of him ever speaking to me about it.

Q. Will you swear here that he never spoke to you about it?

A. Yes, sir.

Q. He never spoke to you about it?

A. To the best of my knowledge.

By Mr. Smyth:

Q. You were interested, as they were your horses, in finding out how the accident happened, weren't you?

A. I was at the time, yes, sir.

Q. At that time?

A. Yes, sir.

Q. You are not any longer?

A. No, sir.

Q. Nor have been for a long time, is that right?

A. Yes.

Q. When it first occurred, you tried to find out about it, didn't you?

A. Yes.

Q. It was generally known in the community that you wanted to know how your horses were killed?

A. Yes.

WILLIAM M. FINCH, a witness in behalf of the plaintiff, recalled in rebuttal, testifies as follows:

By Mr. Smyth:

Q. I will ask you now to state to the jury whether you saw a sign under the bell on the railroad crossing at this Haverstraw crossing, at this Haverstraw crossing on the morning of the accident, when you got there shortly afterwards?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial, and not proper rebuttal.

256 The Court: Objection overruled.

Mr. Cannon: Exception.

A. Yes, sir.

Q. Describe that sign and what was on it?

Mr. Cannon: I make the same objection.
The Court: Overruled.
Mr. Cannon: Exception.

A. It was a board between seven and eight inches wide and about two feet six inches, or so, long, with black letters on a white background, the letters saying "Bell out of order."
Q. Where was that sign placed?

Mr. Cannon: Same objection.
The Court: Same ruling.
Mr. Cannon: Exception.

A. Under the bell on the signal post.
Q. You saw that when you got there that morning?
A. Yes.
Q. That was, I think you said, about seven o'clock?
A. Shortly after.
Q. I thought you said seven o'clock?
A. Shortly after.

Mr. Cannon: Seven-ten, he said.
Mr. Smyth: That is all.

By Mr. Cannon:

Q. Would you be surprised to know, then, they did not have signs of that sort at that time, at that crossing?
A. No, sir; I would not be at all surprised.

By Mr. Smyth:

Q. You would not be surprised at any claim, would you Mr. Finch?
A. No, sir; not at all.
Q. You know you saw the sign?
A. Yes.
257 Q. You would be surprised if your eyes failed you?
A. Certainly would.

By Juror No. 7:

Q. How was the sign attached to the post?
A. I could not say whether there was a nail driven through it or whether there was a hole in the board and hung on the nail.

By Mr. Smyth:

Q. It was one way or the other; it was suspended by a nail in some way?
A. Yes.
Q. It was suspended there by being hung on a nail or having a nail driven through it?
A. Yes, sir.

By the Court:

Q. Did you ever see such a board there after this accident?

A. No, sir; not to my knowledge. I paid no attention to such a thing.
Q. You were accustomed to pass that place?
A. Yes.
Q. Frequently?
A. Yes, sir.
Q. For the five or six months subsequent to the accident?
A. After the accident, yes, sir.
Q. You are quite certain, are you that you are not confused?
A. Quite certain.
Q. The fact that you saw a sign there, you are certain you are not confusing that with the time when you saw it?
A. Certain, yes, sir.

(Witness excused.)
Mr. Smyth: The plaintiff rests.
Mr. Cannon: I would like to call a witness in surrebuttal.

258 FREDERICK J. DONNELLY, called as a witness in behalf of the defendant, in surrebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Cannon:

Q. Where do you reside and what is your business?
A. Station agent, Sloatsburg, New York.
Q. Station agent for what railroad?
A. The Erie Railroad.
Q. How long have you been thus employed?
A. Five and one-half years.
Q. How long have you been working for the Erie Railroad Company?
A. I have served about twenty-three years—twenty-two years, I think.
Q. It has been testified to here that in March, 1909, that you had crossing signs on which were written "Bell out of order," at your station. Did you have such crossing signs in March, 1909?
A. No, sir; the crossing signs were received by me October 7th, 1909.

By the Court:

Q. Did you receipt for them?
A. I receipted for them, and my signature is on the bottom of that paper (indicating paper handed him by counsel).

Mr. Cannon: I offer in evidence that paper.
Received in evidence and marked Defendant's Exhibit M.

By Mr. Cannon:

Q. You say you did not have any crossing signs there before the time they were received in the fall of 1909?
A. No, that is the first crossing sign I ever saw.

Q. What was the color and printing of that, do you remember?
A. No, I don't remember.

259 By Mr. Smyth:

Q. You don't remember them?
A. I remember the crossing sign being there, but I don't recall the color now, because they have been taken away so long.

By Mr. Cannon:

Q. How long have you lived in Sloatsburg?
A. I was born there. I have been away from there.
Q. Do you know Sanford Conklin?
A. Yes.
Q. How long have you known him?
A. I think I have known him to speak to for a year or a year and a half, but not to exceed a year and a year and a half, that is, personally.
Q. You have only known him a year and a half?
A. Yes, to speak to him. I have seen him there.
Q. Now, Mr. Donnelly, do you know of any general reputation of Mr. Sanford Conklin as to his being untruthful, in the Village of Sloatsburg?
A. No; never heard anything.
Q. Or dishonest?
A. No.

Mr. Cannon: That is all.

Cross-examination by Mr. Smyth:

Q. You don't know one way or the other, what his general reputation is, do you?
A. Nothing any more than I would possibly know it if there was anything wrong or dishonest.
Q. You mean if he had been convicted you might know that?
A. Yes.
Q. But you don't really know much about Mr. Conklin?
A. Not any more than to know the man and to speak to him for a year and a half.
Q. This last year and a half past?
A. No, previous to that; about the time he left Sloatsburg.
Q. About the time he left Sloatsburg?
A. Yes.
Q. That was since the accident?
A. Oh, yes.
260 Q. You have known Mr. Waldron well, haven't you?
A. I have known Mr. Waldron for years.
Q. He is a highly respected citizen of Sloatsburg, isn't he?
A. Yes; I know nothing against his reputation whatever.
Q. You would take his word as well as you would take any man's bond, wouldn't you?

A. I would take his word, yes.
Q. You would take his word for anything?
A. Yes.
Q. For anything he said he knew?
A. Yes, I would take his word as being reputable.
Q. He had held as high position in the public service there as there are in Sloatsburg?
A. I don't know that he ever held any office there.
Q. The change that was made about the sign was putting them under your jurisdiction in the fall; before that they were under the track foreman, weren't they?
A. I never had charge of anything but simply I receipted for those signs, as the agent for the Erie Railroad. I had received them at my station.
Q. Whether the track foreman used them before that you don't know?
A. I never saw them before.
Q. You never yourself happened to see them?
A. Never saw them.
Q. It was his jurisdiction to use them and keep them in the tool house if he wanted to?
A. He had his tools. I never had any jurisdiction over them.
Q. And they may have been kept in the tool house and you not know it?
A. They might be.
Q. What do you know about Mr. Finch's reputation in the community?
A. I have known him all my life and I would take his word for anything, always have.
Q. You always have?
A. Yes; in dealing with those people at the station.
261 Q. You have not had the slightest doubt of anything he said?
A. No.
Q. Anything he has said has always been true?
A. As far as I know, yes.

By Mr. Cannon:

If it developed here that there were no out of order crossing signs in March, 1909, at this crossing and Mr. Finch said there was such a crossing sign on March 3rd, 1909, what would you then say about Mr. Finch?

Mr. Smyth: I object to that on the ground that that is for the jury to say.
The Court: There has been testimony to that effect. Is that what you mean?

Q. Yes; Mr. Finch has testified here he saw crossing signs on that crossing, on March 3rd, 1909, in effect, "out of order"?
A. I would say that he was mistaken as to the time.
Q. You had those crossing signs later on?

A. Yes.
Q. Have you them now?
A. No; they were sent in.

By Mr. Smyth:

Q. They had the crossing signs that were sent to you afterward, but you were not prepared to say that Mr. Finch said that he saw a sign there, not one of the kind that were sent to you, but some other kind; you are not prepared to say, then, that there was not such a sign, are you?
A. No.

By Mr. Cannon:

Q. Do you understand that question?
A. I understand that there might have been some other sign there previous to my getting these.

Mr. Smyth: Yes.

262 Q. That is what I am referring to: were there any out of order signs?
A. Never to my knowledge.
Q. You never saw any?
A. That is right.
Q. Were you up to the Haverstraw crossing on the day of this accident?
A. I was.
Q. Did you see any such signs as that, "out of order," on the crossing post?
A. I did not.
Q. What time of day were you up there?
A. I was up there at 9:15.

By Mr. Smyth:

Q. You got up there after the workmen got there?
A. Yes.
Q. The signal workmen?
A. I don't know if there were any signal workmen there.
Q. They said they got up there at nine o'clock?
A. I could not say.
Q. So there may have been no sign there when you got there at 9:15 and the workmen fixed the bell and took the sign away? (No response by the witness.)
Q. Don't you think the whole mixup is that the signal bell was repaired on the 3rd of March and not the 2nd of March?

Mr. Cannon: I objected to that as incompetent, immaterial and irrelevant.
The Court: It is immaterial what this witness thinks. It is a matter of inference.

WILLIS CLARK, a witness on behalf of defendant, recalled in surrebuttal, testified as follows:

Direct examination by Mr. Cannon:

Q. In March, 1909, did you have on your section any out of order crossing bell signs?

A. No.

263 Q. You did not have any in your tool house at that time?

A. No.

Q. Did you have any in your section at all?

A. I did not have any.

Q. When did you first get any on your section?

A. It was the following fall after the accident.

Q. What time did you get up to the Haverstraw crossing on the morning of the accident?

A. The first time, somewhere around six o'clock.

Q. Was there any out of order sign on the crossing bell when you got there?

A. No.

Q. When were you up again that day?

A. I was up there about 6:45, I should think, or 6:50.

Q. Was there any out of order sign on the crossing bell at that time?

A. No, sir.

Q. Did you see any that day?

A. No.

By Mr. Smyth:

Q. Suppose a bell was out of order before October, 1909, what means did the railroad take to warn persons crossing that it was out of order.

Mr. Cannon: I object to that, as incompetent, immaterial and irrelevant.

Mr. Smyth: Before October, 1909; certainly that is competent.

The Court: What means, if any, did the railroad take, so far as you know?

Mr. Cannon: Same objection to your Honor's question, and exception.

Q. What means, if any, did the railroad company take to warn persons when the bell was out of order, if you knew?

Mr. Cannon: Exception.

The Witness: The bell would ring continuously if it was out of order. That was a warning.

264 Q. That was a warning; you mean, then, that a stranger coming there would have no means of knowing the bell was out of order, so far as the railroad was concerned—you don't mean that, do you, that—did the road conduct its business that way?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.

The Court: One question at a time. Objection sustained as to the second question.

Mr. Smyth: I withdraw them both.

Mr. Cannon: Exception to both questions. I object to both questions.

The Court: They are both withdrawn.

Mr. Smyth: They are both withdrawn.

Q. Do you mean to say the railroad company used no means before October, 1909, to warn those going to cross over where the bell was out of order, to warn them the bell was out of order?

Mr. Cannon: I object to that as incompetent, immaterial and irrelevant.

The Court: That is more properly addressed to the gentlemen you are facing than to the witness, I think.

Q. I will ask you the direct question: Were any means taken by the Erie Railroad to warn persons going to cross where there was a bell out of order, to warn them it was out of order, before October, 1909?

The Court: The witness has already answered that the ringing was a warning.

Mr. Cannon: Same objection.

The Court: Objection sustained.

Q. Is that the only answer you desire to make, that the bell was the warning?

265 Mr. Cannon: Same objection.

The Court: That has already been answered.

Mr. Cannon: Exception.

The Court: He may answer this question just put.

Mr. Cannon: Exception.

The Witness: That is all, yes.

Q. Supposing the bell was out of order and did not ring at all, then how was the public to be notified that the bell was out of order, prior to October, 1909?

Mr. Cannon: Same objection.

The Court: Overruled.

Mr. Cannon: Exception.

(No response by the witness.)

By the Court:

Q. Are you able to answer that question?

A. If the bell did not ring at all, of course they would not have the warning, I suppose.

By Mr. Smyth:

Q. Would not have what?

A. Any warning, if the bell did not ring at all; but that bell, when it was out of order, kept ringing all the while.

Q. That was the habit of that bell?
A. Yes.

Mr. Cannon: I object to that, and move to strike out the answer.
The Court: Strike out the characterization. The witness has testified what he did.

Q. I want to find out if they did not have some sign that they used in case the bell did not ring at all—didn't they?
A. I had no sign, no. There was none there.

266 By Mr. Cannon:

Q. What is your idea of Mr. Conklin's reputation for truth and honesty?
A. I never heard he was not, or anything of the kind.
Q. How long have you lived up in Sloatsburg?
A. Seventeen years I have been there.

(Witness excused.)
Mr. Cannon: The defendant rests.
Mr. Smyth: The plaintiff rests.
Mr. Cannon: I renew my motion to dismiss the complaint made at the end of the plaintiff's case.
I also move to dismiss the complaint on all the evidence upon each and all of the following grounds:
First, the plaintiff has failed to establish a cause of action against the defendant.
Second, that the plaintiff has failed to prove that the deceased was free from contributory negligence.
Third, that it affirmatively appears that the deceased was guilty of contributory negligence.
Fourth, that there is no proof whatever that the deceased looked or listened before attempting to cross the track.
Fifth, the alleged cause of action set forth in the complaint has been settled and satisfied and the release and receipt of the Russian Vice Consul constitute a bar to this action.
Sixth, the plaintiff has not legal capacity to sue or to maintain this action for the reason that the Surrogate of Rockland County had no jurisdiction or right to issue letters of administration to the plaintiff.
Seventh, on all the evidence in the case the plaintiff is not entitled to recover.

267 I also move for a direction of a verdict on each and every one of the grounds stated in my motion to dismiss the complaint.

Mr. Smyth: There is no proof that the deceased was a subject of Russia.
The Court: Decision reserved on both motions.
Mr. Smyth: I move for a direction of a verdict for the plaintiff.
The Court: The motion will be granted now and the Court directs a verdict for the plaintiff. We will have to assess the damages. Will you waive the presence of the jury?
Mr. Smyth: Yes.

Mr. Cannon: Yes.

Mr. Smyth: The direction of the verdict in the absence of the jury is waived by counsel for both sides. Do you acquiesce, Mr. Cannon?

Mr. Cannon: Yes.

The Court: The Court directs a verdict in favor of the plaintiff for the sum of $6,000.

Mr. Cannon: Exception to your Honor's direction of a verdict in favor of the plaintiff.

We now move to set aside the verdict and for a new trial on the ground the verdict is against the evidence, against the weight of e-idence, against the law, and upon all the grounds stated in Section 999 of the Code of Civil Procedure, save that of inadequacy.

The Court: Decision reserved. I will give either side desiring it a stay of thirty days and sixty days to make a case from the date when I render my decision.

Mr. Cannon: Then the defendant will submit brief in ten days and plaintiff will submit answering brief in ten days thereafter and submit to the Court three weeks from today?

The Court: You take no exception to the reservation by the Court of the motion to dismiss the complaint?

268 Mr. Cannon: No, I do not, so you can either dismiss or direct a verdict.

The Court: My ruling on that will be subject to an exception, for one side or the other.

PLAINTIFF'S EXHIBIT 1.

(State Seal.)

The People of the State of New York to Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, late of the Town of Ramapo, County of Rockland, Deceased, Intestate, Send Greeting:

Whereas, the said deceased, at the time of his death, was a resident of the County of Rockland, by means whereof the ordering and granting administration of all and singular the goods, chattels and credits of the said deceased, and also the auditing, allowing, and final discharging the account thereof doth appertain unto us; and we being desirous that the said goods, chattels and credits may be well and faithfully administered, applied and disposed of, do grant unto you the said Walter G. Hamilton, as Public Administrator full power by these presents to administer and faithfully dispose of all and singular the said goods, chattles and credits; to ask, demand, recover and receive the debts which unto the said deceased whilst living, and at the time of his death, did belong; and to pay the debts which the said deceased did owe, so far as such goods, chattels and credits will thereto extend, and the law require; hereby

Plaintiff's Exhibit 2.

requiring you to make, or cause to be made, a true and per-
269 fect inventory of all and singular the goods, chattels and credits of the said deceased, which shall or have come to your hands, possession or knowledge; and the same so made to exhibit, or cause to be exhibited, in the office of the Surrogate of the said County, at or before the expiration of three months from the date hereof, and that you obey all orders of the said Surrogate, or Surrogate's Court, touching the administration of the said estate, and render a just and true account of administration, when thereunto required; and we do by these presents depute, constitute, and appoint you, the said Walter G. Hamilton, Administrator of all and singular the goods, chattels and credits which were of the said deceased.

In testimony whereof, We have caused the seal of our said Surrogate's Court to be hereunto affixed. Witness, William McCauley, Surrogate of the said County, at his office in Haverstraw the first (1st) day of March one thousand nine hundred and eleven.

WILLIAM McCAULEY, *Surrogate.*

(Here follows photograph marked page 270.)

271 PLAINTIFF'S EXHIBIT 5.

(*Defendant's Exhibit A1, A11 for Identification.*)

Erie Railroad Company.
Chicago & Erie Railroad Company.
New York, Susquehanna & Western Railroad Co.
New Jersey & New York Railroad Co.

STATE OF NEW YORK,
County of Rockland, ss:

William Hand, being duly sworn, says: I reside at Sloatsburg, N. Y.; am 21 years of age and am a tinsmith by occupation. I recall the occasion of the accident to Steve Mitch and property of B. Waldron at Sloatsburg on March 3rd, 1909.

On March 3rd, 1909, about 5.35 A. M. I started to work and caught a freight train in front of station and rode to the first crossing west of the station where I got off. When I got off of the caboose of the train I noticed a two-horse rig standing on the south side of the tracks waiting for the freight train to go pass. The two-horse rig was standing about 10 feet south of the east-bound track while waiting for the west-bound train to pass and just as soon as it crossed the highway, the man driving the team drove on the track. When I got about 50 feet north of the west-bound track I heard a rumbling noise and on looking around I saw an east-bound train approaching the crossing. The express train then was about 300 feet west of the crossing. The first that the driver seemed to see the train was when his horses were on the east-bound track and so he tried to hurry his horses by hitting them with the reins, but it was too late for him to try and get off of the tracks and so the
272 engine of the train struck the rig between the rear of the horses and the front wheel. The crossing bell was ringing at the time and kept on ringing after both trains got pass the crossing. I did not hear the whistle on the engine of the express train blow and I did not hear the bell on the engine ring. It was daylight at the time but a little foggy.

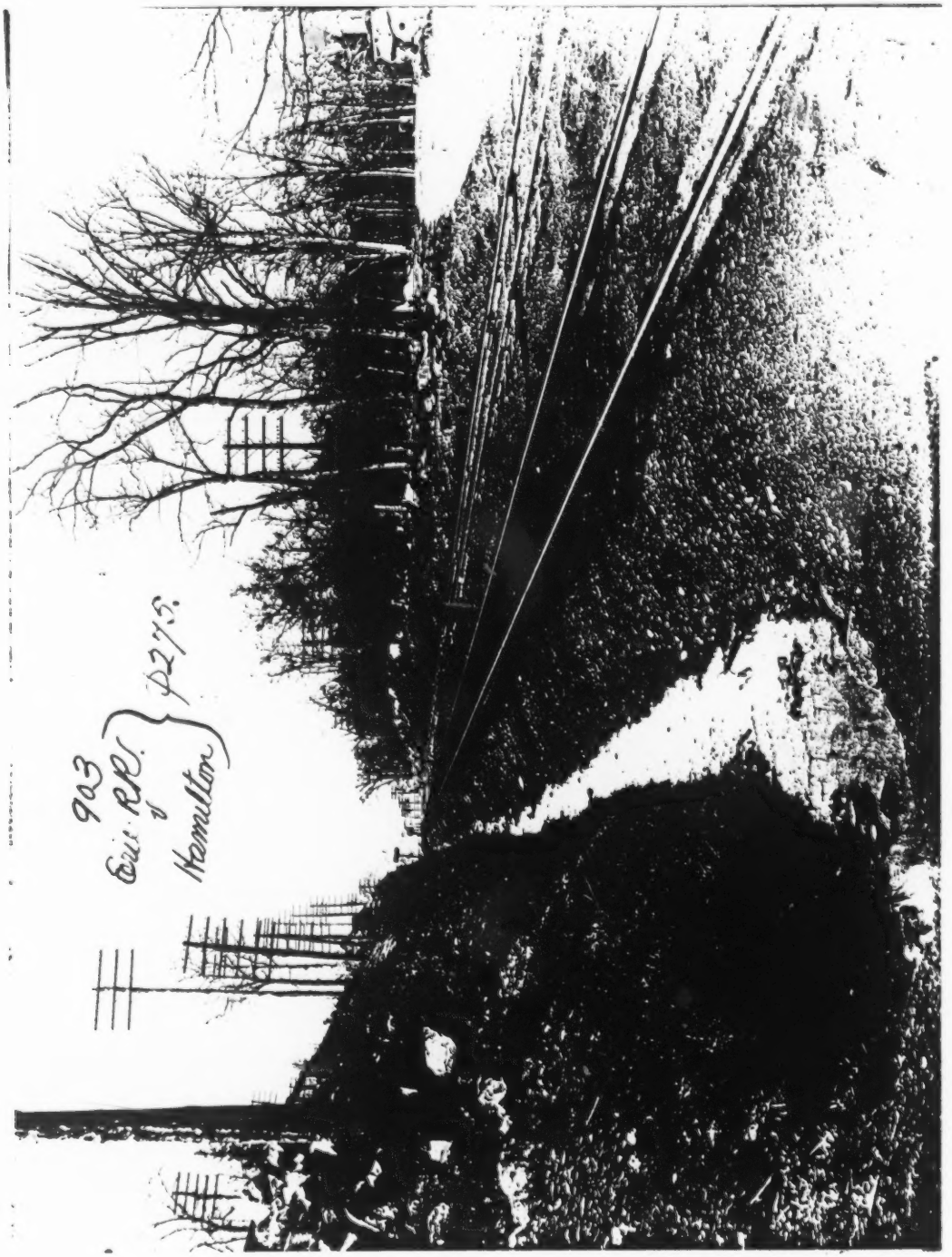
The statement was read by me in the presence of the parties who have signed their names as witness hereto, and it is a full, true and correct statement of the facts.

(Signed) W. HAND.

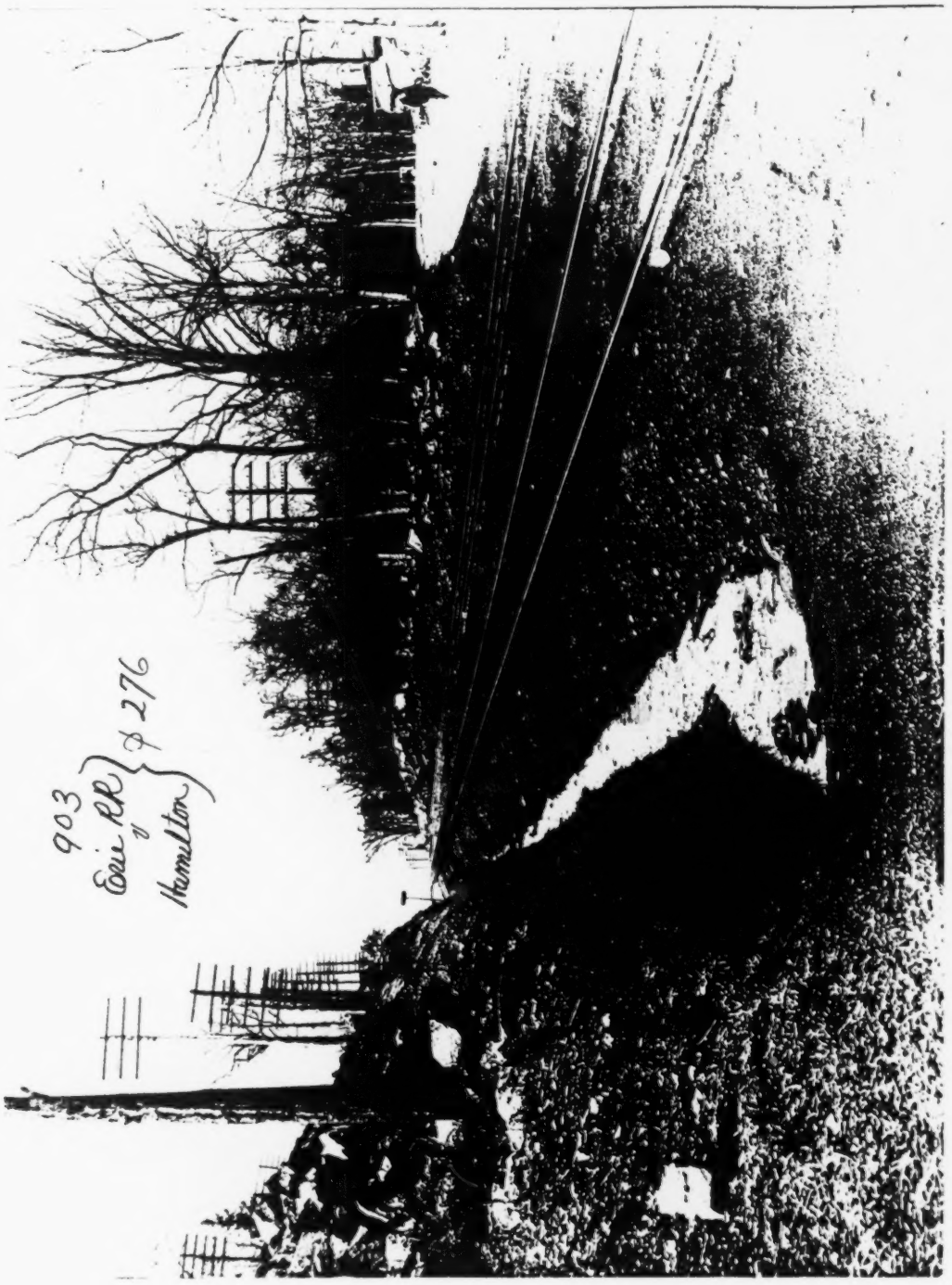
Sworn to before me this 7th day of May, 1909.

(Signed) H. H. VAIL,
Notary Public, Orange Co.

Defendant's Exhibit A.

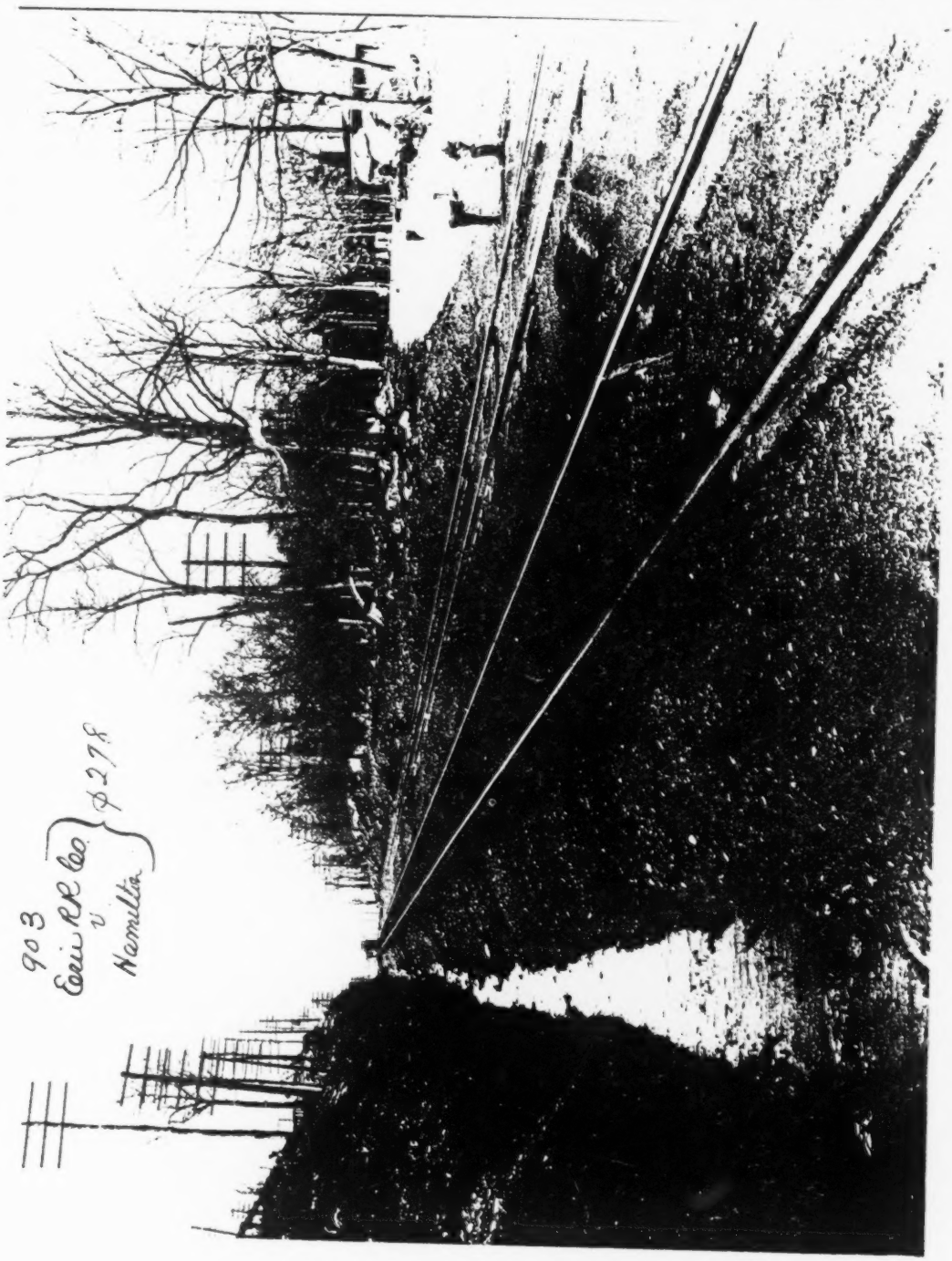


Defendant's Exhibit B.

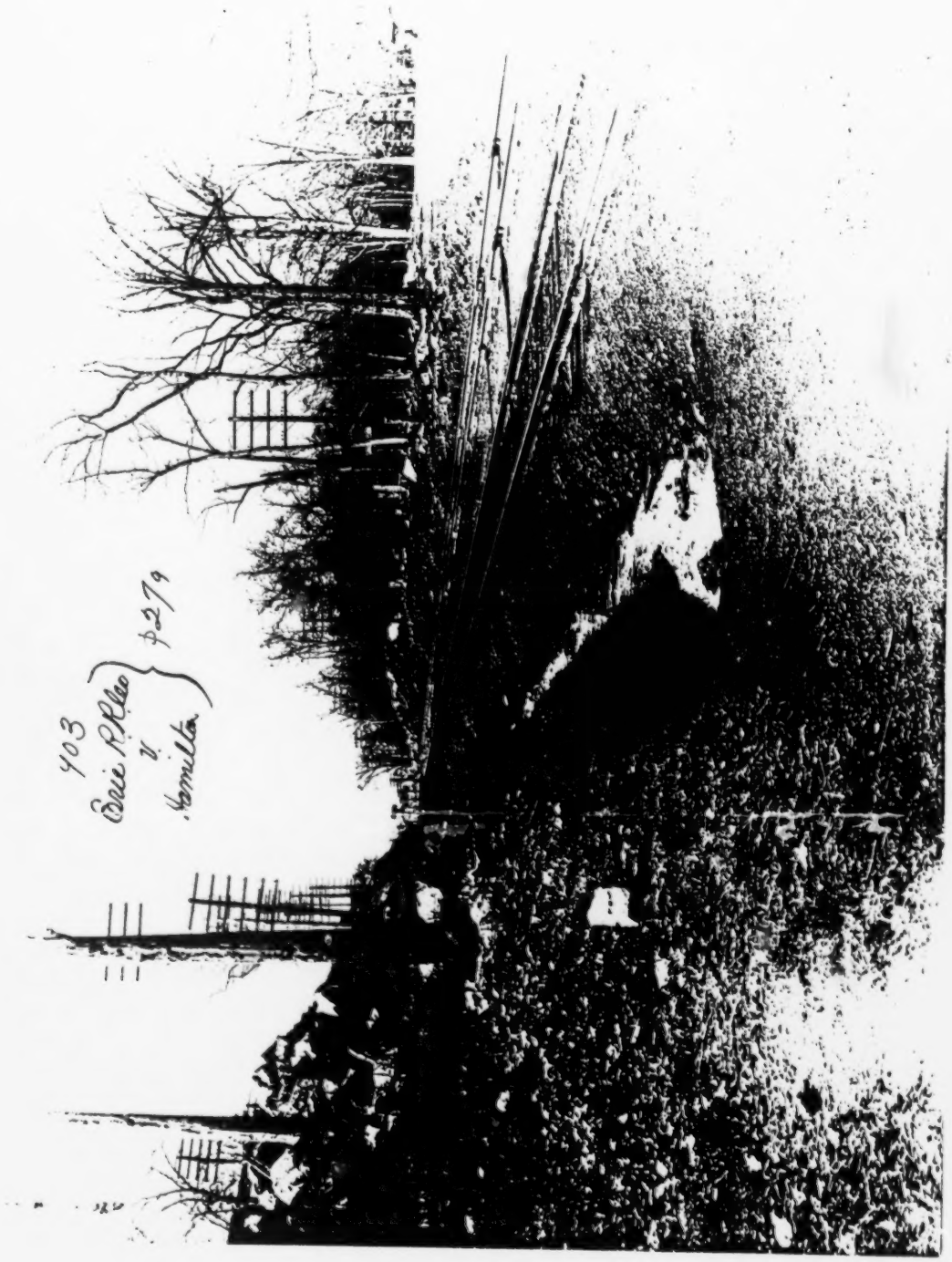


Defendant's Exhibit C.

Defendant's Exhibit D.



Defendant's Exhibit E.



Defendant's Exhibit F.

273 PLAINTIFF'S EXHIBIT 6.

Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

GENTLEMEN: You will please take notice that on the trial of this action I shall move the court for leave to amend the complaint herein, so that the sub-division thereof marked "IV" shall read as follows:

"IV. That on or about the third (3rd) day of March, 1909, Stephen Mistschook was travelling in a vehicle drawn by two horses along the said public highway known as the Haverstraw Road and when he reached the place where said railroad crosses said highway near the said Sloatsburg station he attempted with due care and caution and without any negligence on his part, to drive over the defendant's tracks, and while so proceeding, the defendant carelessly and negligently, in the operation of its said railroad, caused one of its locomotives with a train of cars attached thereto to approach said crossing and then and there pass rapidly over the track of
274 said railroad, and negligently and carelessly omitted to give any warning thereof or to give any signal by ringing the bell or sounding the whistle of said locomotive and carelessly and negligently failed to maintain gates or any barrier at said crossing or to have a flagman at said place and allowed the signal bell which customarily was rung when trains came in dangerous proximity to said crossing, to be removed or get out of order so that it failed to ring, or rang continuously, and by reason thereof the said Stephen Mistschook was unaware of the approach of said locomotive and train of cars, and he and the horses he was driving were killed and the vehicle was broken by being struck by the said locomotive and thrown a great distance."

Dated, New York, December 29, 1913.

Yours, etc.,

CHARLES C. SANDERS,
Attorney for Plaintiff.

Office & P. O. Address, 206 Broadway, Borough of Manhattan, New York City.

To Messrs. Stetson, Jennings & Russell, Attorneys for Defendant.

(Here follow photographs marked pp. 275 to 280, inclusive, and diagram marked page 281.)

282 DEFENDANT'S EXHIBIT H.

No. 2865.

United States of America.

Department of State.

To All to Whom these Presents Shall Come, Greeting:

I certify that the documents hereto annexed are true copies from the files and records of this Department.

In Testimony Whereof, I, W. J. Bryan, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this sixth day of January, 1914.

W. J. BRYAN,
Secretary of State.
By BEN G. DAVIS,
Chief Clerk.

(Seal of Department of State. United States of America.)

Copy.

Serial No. 133. May 8, 1909.

Excellency:

Referring to the Department's note of the first instant. I have the honor to inform you that temporary recognition has been accorded Pierre Adamovitch as Vice Consul of your Government at New York City.

Accept, Excellency, the renewed assurances of my highest consideration.

P. C. KNOX.

His Excellency, Baron Rosen, Ambassador of Russia.

283 Copy.

Ambassade Imperiale de Russie,

Washington, D. C.

N 212. LE 27 AVRIL, 1910.

Monsieur le Secretaire d'Etat:

M. Adamovitch, Vice-Consul de Russie a New York, vient d'etre transfere en la meme qualite a Berlin, et M. M. Ragozine a ete nomme pour remplacer M. Adamovitch.

En Portant ce qui precede a la connaissance de Votre Excellence,

je saisis cette occasion pour Lui renouveler les assurances de ma plus haute consideration.

ROSEN.

Son Excellence, Monsieur Philander C. Knox, Secretary d'Etat, etc., etc.

DEFENDANT'S EXHIBIT I.

Erie Railroad Company to Irene Miszuk, Adm'r, etc., of the Estate of Steve Miszuk, Deceased, or The Russian Imperial Consul General, Care Claim Agent, Dr.

25857.

When the receipt herein is dated and signed as required this voucher is payable at any time within thirty days from Sep.
284 28, 1909, at the Commercial Trust Company of New Jersey, Jersey City or United States Mortgage & Trust Co., New York.

(S'g'd) W. B. BANICKER,
Ass't Treasurer.

For and in full settlement of all claims and demands against the company for the death of Steve Miszuk, at or near Sloatsburg, N. Y., on or about March 3rd, 1909. $400.00

(Stamped on front:) Paid Treasurer, Erie R. R. Co., Oct. 9, 1909, Paying Teller. Paid Oct. 8, 1909, United States Mortgage & Trust Company.

I Certify that the above account has been duly authorized and approved by the proper officers, that the same has been examined by me and found correct and has been registered and filed in this office.

(S'g'd) J. G. LIVENGOOD,
Auditor of Disbursements.

Approved for Payment.

(S'g'd) M. P. BLAUVELT,
Comptroller.

Received October 6, 1909, of Erie Railroad Company, Four hundred & No/100 dollars in full of the above account.

IMPERIAL RUSSIAN CONSUL GENERAL,
NEW YORK,
By P. D'ADAMOWITSCH,
Vice Consul.

(Seal of Consulate General of Russia at New York.)

(Endorsed as follows:) Erie Railroad Company. Voucher No. 833, Registered in office of Auditor of Disbursements in the month of Sept., 1909. Paid Oct. 8, 1909, First Nat'l Bank, New York. Pay to the order of First National Bank of New York, Agency of Russo-Chinese Bank.

285 DEFENDANT'S EXHIBIT J.

Release.

Know All Men by These Presents, That I, Irene Miszuk, as wife, and Admx. of the Estate of Steve Miszuk, by Baron A. Schoppenbach, the Imperial Russian Consul in sole consideration of the sum of Four hundred and 00/100 dollars, to me in hand paid by the Erie Railroad Company, do hereby for myself, my heirs, my executors, administrators and assigns, release and forever discharge said Erie Railroad Company, and all other lines or companies leased, operated or controlled by or allied with it, and each of them, together with their and each of their successors and assigns, from all debts, claims and demands whatsoever, including such as have arisen by reason of, or in any manner grow out of the death of Steve Miszuk at or near Sloatsburg, New York, on or about March 3, 1909.

In Witness Whereof, I have hereunto set my hand and seal the 6th day of October in the year one thousand nine hundred & nine.

IMPERIAL RUSSIAN CONSUL-GENERAL.
NEW YORK. [L. S.]
By P. D'ADAMOVITSCH,
Vice Consul.

Signed, sealed and delivered in presence of
THOMAS K. TRENCHARD.

(Seal of Consulate General of Russia at New York.)

286 STATE OF NEW YORK,
County of New York, ss:

On this 6th day of October, in the year one thousand nine hundred & nine, before me, the subscriber, personally came Baron A. Schlippenbach, to me known to be the individual who is described in and who executed the foregoing release, and acknowledged that he executed the same for the purposes therein mentioned.

(S'g'd) T. K. TRENCHARD,
Comm'r of Deeds, City of N. Y.

STATE OF NEW YORK,
County of New York, ss:

Baron A. Schloffenbach, being duly sworn, deposes and says that he is the person named in and who executed the foregoing release; that before executing the same, the said release was read by him; that

he knows the contents thereof and fully understands that by signing said Release he discharges and releases the Erie Railroad Company, and all other lines or companies leased, operated or controlled by or allied with it, and each of them, together with their and each of their successors and assigns, from all claims and demands which he has against it or them on account of the matters therein set forth.

IMPERIAL RUSSIAN CONSUL-GENERAL,
NEW YORK,
P. D'ADAMOVITCH, *Vice Consul.*

Sworn to before me this 6 day of Octo., 1909.

THOMAS K. TRENCHARD,
Com. of Deeds, City of N. Y.

(Seal of Consulate General of Russia at New York.)

287 DEFENDANT'S EXHIBIT K FOR IDENTIFICATION.

Translation.

Handed by:

1911, November 5th. I, the undersigned, peasant woman of the village Ozero, of Trostianzy volost, district of Lutzk, wife of the killed in America Stepan Gerasimov Mestschuk, Irina Zinovieve Mestschuk, give this receipt to the Trostianzy Volost Board to the effect that the deposit in the sum of seven hundred and seventy roubles (770 rbls. 80 kop.), sent as compensation for my husband, who was killed in America, was received by me, and this I acknowledge by my signature. Peasant woman of v. Ozero, Irina Mestschuk, and for her, who is illiterate, and at her personal request, signed peasant of v. Trostianzy Daniil Olchovitsch.
Trostionzy Volost Elder: (sig. P. GUZIYK.)

(Seal of Trostianzy Volost Elder.)

244.

The Imperial Russian Consulate General at New York herewith certifies the correctness of the English translation from the Russian Document hereto attached.
New York, January 12/25, 1912.

CONSUL GENERAL,
By Y. LAVOROFF,
Vice-Consul.

(Seal of Consulate General of Russia at New York.)
3 roubl.
(Document in Russian attached.)

288 DEFENDANT'S EXHIBIT L FOR IDENTIFICATION.

Translation.

Ministry of the Interior.

Governor of Volynia.

Provincial Board.

Section III, Table I.

29th November, 1911.

No. 6268.

City of Jitomir.

To the Imperial Russian Consulate General in New York:

I have the honor to forward the receipt of the widow of peasant Stepan Mestschuk, who died in America, Irina Mestschuk, dated 5th November of this year, for 770 roubles, 80 kopeks, sent with the letter of 8/25 September, 1909, sub No. 2770.

Governor, Chamberlain of the Court of His Imperial Majesty:
(Sig. P. A. KUTAISOFF.)

Vice-Governor: (Sig. MELNIKOFF.)
Councillor: (sig. illegible.)
Chief Secretary: (sig. illegible.)

243.

The Imperial Russian Consulate General at New York herewith certifies the correctness of the English translation from the Russian Document hereto attached.

New York, January 12/25, 1912.

CONSUL GENERAL,
By Y. LAVOROFF,
Vice-Consul.

(Seal of Consulate General of Russia at New York.)
3 roubls.
(Document in Russian attached.)

289 DEFENDANT'S EXHIBIT M.

Erie Railroad Company,

PATERSON, N. J., Oct. 6, 1909.

Mr. P. Donnelly, Agent, Sloatsburgh, N. Y.

DEAR SIR: There has been sent to you four signs reading Bell Out of Order, for use on the bells on the crossings west of your station, when they are out of order. Please advise if you have received them.

Yours truly,

CHAS. PFITZNER,
Supr. Crossings.

(Pencil memo as follows:)
Yes sir, they are here.
(Sgd.) P. J. DONNELLY, *Ag't.*

10/7/09.

The foregoing case contains all the evidence and testimony offered and given upon the trial of this action.

Stipulation Settling Case.

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action and that the same be settled and ordered to be filed and annexed to the judgment roll herein.

Dated, New York, July 31, 1914.

CHARLES C. SANDERS,
Attorney for Plaintiff-Respondent.
STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant-Appellant.

290 *Order Settling Case.*

On the above stipulation, the foregoing case on appeal containing all the evidence is hereby settled and ordered on file.

Dated, New York, Sept. 28, 1914.

EDWARD J. GAVEGAN, *J. S. C.*

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the judgment roll and the case and exceptions, as settled, and the whole thereof, now on file in the office

of the Clerk of the County of New York, and certification thereof by the Clerk of said county, pursuant to Section 1353, is hereby waived.

Dated, New York, July 31, 1914.

CHARLES C. SANDERS,
Attorney for Plaintiff-Respondent.
STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant-Appellant.

Opinion by Mr. Justice Gavegan.

HAMILTON

v.

ERIE R. R.

Motion to set aside a verdict for plaintiff. The verdict was directed by the Court upon motion of both parties at the close of the whole case. The plaintiff is County Treasurer of Rockland County, and sues as public administrator of the goods, chattels and credits
291 of one Stephen Mistschook, who was killed by one of defendant's trains at Haverstraw Road Crossing, in said county. It is claimed by defendant that the deceased was a subject of the Czar of Russia. He left no surviving widow and next of kin in this country. After the accident which resulted in decedent's death the defendant entered into negotiations with P. d'Adamovitch, the duly accredited and recognized Vice-Consul of Russia in this State. As a result of these negotiations the defendant paid to the said P. d'Adamovitch the sum of $400 in full settlement of any claim for damages for decedent's death, and at the same time took said d'Adamovitch's general release, which purported to be made in behalf of decedent's widow and next of kin, who are subjects of the Czar of Russia, residing in the Village of Ozero, Province of Volhynia. Article VIII of the treaty between the United States and Russia, in force at the time of the alleged settlement of the claim, provided: "The two contracting parties shall have the liberty of having in their respective ports consuls, agents and commissaries of their own appointment, who shall enjoy the same privileges and powers as those of the most favored nations." The "most favored nation" clause of the treaty, so far as relates to the question here presented, is found in Article IX of the treaty between the United States and the Argentine Republic, which provides: "If any citizen of either of the high contracting parties shall die without will or testament in any of the territories of the other, the consul-general, or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Relying on the reading and interpretation of the language of the fore-

going, defendant contends that the Russian Vice-Consul,
292 d'Adamovitch, had the exclusive right to adjust the claim for damages for the death of the decedent, and that therefore his release is binding and a bar to a recovery in this action. The question as to whether a foreign consul has a prior and exclusive right, in the absence of a widow, next of kin or creditor, to letters of administration on the estate of a deceased foreign subject here has been passed upon in this county by the late Surrogate Thomas (in re Legiorato's Estate, 69 N. Y. Supp., 507). The decedent in that case was a subject of the King of Italy and died in this country intestate, leaving no relatives here. The Italian Consul here, pursuant to the treaty with the "most favored nation," applied for letters of administration. The surrogate at page 509 said: "It will be observed that the right assured to the consul-general is to 'intervene,' and this intervention is to be 'conformably with the laws of the country.' To intervene is to 'come between' (Webster's Dictionary), and the right to intervene in a judicial proceeding is the right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire corpus of a fund which is the subject of the proceeding. A right to intervene 'conformably with the laws' of the State of New York is something different from the right to set aside the laws of the State and take from a person who by those laws is the officer intrusted with the administration of estates of persons domiciled here and who leave no next of kin within the jurisdiction the right and duty of administering their estates. And when the laws of the State require an administrator to give bond, to be measured by the value of the assets, nothing in the treaty provision grants to the consul immunity from this requirement to be obtained merely by asserting in substance that he has no knowledge of the existence of any debt. The eminent text writers cited in the opinion
293 of the learned Surrogate Silkman do not intimate that the courts of civilized states, acting under general laws passed for the protection of foreigners equally with their own citizens, must grant administration, contrary to the terms of those laws, to consuls under any circumstances whatever. * * * Consuls may accept administration, but no right to override local law is suggested." The reasoning in this opinion has been followed by the United States Supreme Court in the case of Bocca v. Thompson (223 U. S., 317), in which Mr. Justice Day, writing the opinion of the court, at page 334 said: "Our conclusion, then, is that if it should be conceded for this purpose that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the Consuls of the Italian Government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws upon the estates of deceased citizens of a foreign country and to commit the same to the consuls of such foreign nations, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of the decease." This case also distinguishes and overrules In re Fattosini's Estate (67 N.

Y. Supp., 1119), In re Labrasciano's Estate (77 N. Y. Supp., 1040), and In re Scutella's Estate (129 N. Y. Supp., 20). I reach the conclusion that the purported settlement with and release of all claims in behalf of the decedent's widow and next of kin was of no binding effect on either this plaintiff or them. Both sides having moved for a direction of a verdict, conceded that there was no dispute in the facts, that there was only a question of law to be passed upon, and that is arose upon a settled and uncontradicted state of facts
294 (Legget v. Hyde, 58 N. Y., 272, 275). I consider that there is sufficient evidence in the case to support the verdict directed for the plaintiff (see Pruey v. N. Y. C. & H. R. R. R., 41 A. D., 158; aff'd 166 N. Y., 616). Motion denied. Defendant may have thirty days' stay and sixty days to make a case.

Order Filing Record in Appellate Division.

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, in the First Judicial Department.

Dated, New York, Sept. 28, 1914.

EDWARD J. GAVEGAN, *J. S. C.*

295 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 25th day of June, 1915.

Present: Hon. George L. Ingraham, Presiding Justice.
" Chester B. McLaughlin,
" Frank C. Laughlin,
" Victor J. Dowling,
" Henry D. Hotchkiss,
Justices.

7521.

WALTER G. HAMILTON, County Treasurer, etc., Respt.,

vs.

ERIE RAILROAD COMPANY, Applt.

Order of Affirmance on Appeal from Judgment Entered on Verdict of a Jury.

An appeal having been taken to this court by the defendant from the judgment of the Supreme Court entered on the 27th day of

March, 1914, and from an order made by said Court denying a motion for a new trial, entered on the 28th day of March, 1914, and for an order of said Court entered on the 21st day of April, 1914, and said appeal having been argued by Mr. William C. Cannon, of counsel for the appellant, and by Mr. Herbert C. Smyth, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously ordered and adjudged that the judgment and order so appealed from be and the same are hereby, in all things, affirmed; and the the respondent recover of the appellant the cost of this appeal.

Enter,

G. L. I.

296 *Judgment of Affirmance.*

Supreme Court, New York County.

County Clerk's Index No. 24,675/11.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattles and Credits of Stephen Mistschook, Deceased, Plaintiff-Resp.,

against

ERIE RAILROAD COMPANY, Defendant-Applt.

The above-named defendant, Erie Railroad Company, having appealed to the Appellate Division of the Supreme Court, for the First Department, from the judgment entered herein in the office of the Clerk of the County of New York on the 27th day of March, 1914, in favor of the plaintiff above-named and against the defendant for the sum of Eight thousand sixty-six and 86/100 ($8,066.86) Dollars, and from the order denying the defendant's motion to set aside the verdict and for a new trial, entered in the office of the Clerk of New York County on the 28th day of March, 1914, and from an order of said Court denying the defendant's motion to dismiss the complaint entered on the 21st day of April, 1914, and the said appeal having been duly argued, and the said Appellate Division having, by an order dated the 25th day of June, 1915, and entered on the said 25th day of June, 1915, affirmed the judgment and orders so appealed from in all things with
297 costs, and the costs having been duly adjusted by the Clerk at the sum of $99.65, upon motion of Charles C. Sanders, attorney for the plaintiff-respondent, it is unanimously

Ordered and adjudged that the judgment and orders so appealed from be, and the same hereby are in all things affirmed, and that the plaintiff-respondent, Walter G. Hamilton, County Treasurer of the County of Rockland, as public administrator of the goods, chattels and credits of Stephen Mistschook, deceased, recover of

the defendant-appellant, Erie Railroad Company, the sum of $99.65, his costs as taxed.

Dated, New York, June 30, 1915.

WM. F. SCHNEIDER, *Clerk.*

Order Granting Leave to Appeal to Court of Appeals.

Court of Appeals of the State of New York.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Deceased, Plaintiff-Respondent,

against

ERIE RAILROAD COMPANY, Defendant-Appellant.

Defendant having moved before me for leave to appeal to the Court of Appeals by notice of motion dated the 23rd day of
298 July, 1915, upon the case on appeal to the Appellate Division, First Judicial Department; and upon the order of the said Appellate Division, unanimously affirming the judgment and orders of the Supreme Court, New York County, made and entered in the office of the Clerk of said Appellate Division on the 25th day of June, 1915; and upon the judgment of affirmance and for the sum of Ninety-nine and 65/100 Dollars ($99.65), entered upon the said order of the Appellate Division in the office of the Clerk of the County of New York on the 30th day of June, 1915; and upon the order of the Appellate Division, First Department, made and entered in the office of the Clerk of said Appellate Division on the 9th day of July, 1915, denying defendant's motion for leave to appeal to the Court of Appeals, or in the alternative for a re-argument of the appeal herein; and upon the affidavit of Rudolph L. von Bernuth, duly verified the 23rd day of July, 1915, and annexed to said notice of motion; and upon the pleadings and proceedings herein; and after hearing Rudolph L. von Bernuth, Esq., of counsel for defendant, in support of said motion, and Herbert C. Smyth, Esq., of counsel for plaintiff, in opposition thereto,

Now, upon motion of Stetson, Jennings & Russell, attorneys for defendant herein, it is

Ordered that the motion of the defendant for leave to appeal to the Court of Appeals be and it hereby is granted, and the defendant be and it hereby is allowed to appeal to the Court of Appeals from the judgment of affirmance and for the sum of ninety-nine and 65/100 dollars ($99.65) costs entered herein in the office of the Clerk of the County of New York on the 30th day of June, 1915.

Dated, Brooklyn, New York, August 12th, 1915.

WILLARD BARTLETT,
Chief Judge of the Court of Appeals.

299 *Notice of Appeal to Court of Appeals.*

Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Please take notice that pursuant to leave given by an order of the Honorable Willard Bartlett, Chief Judge of the Court of Appeals, dated August 12th, 1915, and duly filed in the office of the Clerk of the County of New York on the 12th day of August, 1915, Erie Railroad Company, the defendant herein, hereby appeals to the Court of Appeals of the State of New York from the judgment of affirmance and for the sum of Ninety-nine and 65/100 Dollars ($99.65) costs entered herein in the office of the Clerk of the County of New York on the 30th day of June, 1915, upon an order of affirmance of the Appellate Division of the Supreme Court, First Department, entered and filed in the office of the Clerk of said Appellate Division on the 25th day of June, 1915, which said judgment and order affirmed a judgment herein in favor of the plaintiff and against the defendant for the sum of Six thousand Dollars ($6,000)
300 damages, and the sum of One thousand, eight hundred and twenty-four Dollars ($1,824) interest, and the sum of Two hundred forty-two and 86/100 Dollars ($242.86) costs, making in all the sum of Eight thousand, sixty-six and 86/100 Dollars ($8,066.86), entered in the office of the Clerk of the County of New York on the 27th day of March, 1914; and also affirmed an order denying defendant's motion to set aside the verdict and for a new trial entered herein in the office of the Clerk of the County of New York on the 28th day of March, 1914; and also affirmed an order denying defendant's motion to dismiss the complaint entered herein in the office of the Clerk of the County of New York on the 21st day of April, 1914; and that the defendant appeals from each and every part of said judgment of affirmance.

Dated, New York, August 14, 1915.

Yours, etc.,

STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant.

15 Broad Street, Borough of Manhattan, City of New York.

To Charles C. Sanders, Esq., Attorney for Plaintiff, 206 Broadway, Borough of Manhattan, City of New York.

301 *Affidavit of No Opinion in the Appellate Division.*

STATE OF NEW YORK,
County of New York, ss:

Rudolph L. von Bernuth, being duly sworn, deposes and says that he is an attorney and counsellor at law connected with the attorneys for the defendant-appellant herein; that he is familiar with all the proceedings had in this action; that no opinion was handed down by the Appellate Division of the Supreme Court for the First Department upon the affirmance of the judgment in favor of the plaintiff, and the order of the Trial Court denying defendant's motion for a new trial and to set aside the verdict, and the order of the Trial Court denying defendant's motions to dismiss, made at the end of the plaintiff's case and at the end of the whole case.

RUDOLPH L. VON BERNUTH.

Sworn to before me this 19th day of August, 1915.

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

302 *Stipulation.*

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the notice of appeal to the Appellate Division, of the judgment roll, of the case and exceptions in this action now on file in the office of the Clerk of the County of New York, and also of the order of affirmance of the Appellate Division, the judgment of affirmance, the order of Honorable Willard Bartlett, Chief Justice of the Court of Appeals, granting leave to appeal to the Court of Appeals, and the notice of appeal to the Court of Appeals; and certification thereof by the Clerk of the County of New York is hereby waived.

Dated, New York, August 19, 1915.

CHAS. C. SANDERS,
Attorney for Plaintiff-Respondent.
STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant-Appellant.

303 At a Special Term of the Supreme Court, Part II, Thereof, Held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 6th Day of December, 1916.

Present: Hon. Mitchel L. Erlanger, Justice.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals from the judgment of affirmance entered and filed in the office of the Clerk of the County of New York on the 30th day of June, 1915, whereby it was adjudged that the judgment entered in this action on the 27th day of March, 1914, in favor of the plaintiff and against the defendant for the sum of Eight thousand sixty-six and 86/100 ($8,066.86) dollars, damages and costs be affirmed, and further adjudged that the plaintiff recover of the defendant the sum of Ninety-nine and 65/100 ($99.65) dollars, costs, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be pro-
304 ceeded upon according to law,

Now on reading and filing the remit-it/ur from the Court of Appeals herein, and on motion of Charles C. Sanders, attorney for plaintiff, it is

Ordered that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Enter.

M. L. E., *J. S. C.*

[Endorsed:] Supreme Court, New York County. Walter G. Hamilton, etc., Plaintiff, against Erie Railroad Company, Defendant. Order on Remit-it/ur. Charles C. Sanders, Attorney for Plaintiff, 206 Broadway, New York City.

SIRS: Please take notice that within is a copy of an order this day made and entered herein in the office of the Clerk of this Court.

Dated N. Y., Dec. 6th, 1916.

Yours, &c.

CHAS. C. SANDERS,
Att'y for Pl'ff.

206 Broadway, N. Y. City.

To Messrs. Stetson, Jennings & Russell, Att'ys for Def't, 15 Broad St., N. Y. Cit-.

305 Supreme Court, New York County.

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistchook, Deceased, Plaintiff-Resp't,

against

ERIE RAILROAD COMPANY, Defendant-App'l't.

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 27th day of March, 1914, for the sum of Eight thousand sixty-six and 86/100 ($8,066.86) dollars; and the defendant having appealed from said judgment to the Appellate Division of this Court for the First Department, and the said judgment having been affirmed in all things by this Court at said Appellate Division, and judgment of affirmance having been rendered thereon the 30th day of June, 1915, and that the plaintiff recover against the defendant Ninety-nine and 65/100 ($99.65) dollars, costs of said appeal; and the defendant having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur, filed herein the — day of December, 1916, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs, and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law; and this Court having by an order duly entered herein the 6th day of December, 1916, ordered that said judgment be made the judg-

306 ment of this Court and the plaintiff's costs having been duly taxed at the sum of One hundred fourteen 70/100 ($114.70) dollars,

Now on motion of Charles C. Sanders, attorney for plaintiff, it is Adjudged that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that the plaintiff recover of the defendant the sum of One hundred fourteen 70/100 ($114.70) dollars, his costs as taxed.

Dated, New York, December 12th, 1916.

WM. F. SCHNEIDER, *Clerk.*

306½ SIR: Take notice that the within is a copy of a judgment this day duly made and entered in the within action in the office of the Clerk of this Court.

Dated, New York, Dec. 12th, 1916.

Yours, &c.,

CHAS. C. SANDERS,
Attorney for Pl'ff,
No. 206 Broadway, New York City.

To Stetson, Jennings & Russell, Esqs., Attorneys for Def't, 15 Broad St.; New York City.

[Endorsed:] County Clerk's Index No. —, Year 191–. Supreme Court, New York County. Walter G. Hamilton, &c., Plaintiff, against Erie Railroad Company, Defendant. Judgment on Remittitur. Charles C. Sanders, Attorney for Pl'ff, No. 206 Broadway, New York City.

307 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court upon a remittitur from the Court of Appeals of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the goods, chattels and credits of Stephen Mistschook, deceased, plaintiff and Erie Railroad Company defendant wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any
308 treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said defendant, Erie Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of January, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 24675–1911. Supreme Court of the United States. October term, 1916. Erie Railroad Company, Plaintiff in Error, vs. Walter G. Hamilton, County Treasurer, etc. Original Writ of Error. Stetson, Jennings & Russell, Solicitors for Plaintiff in Error, 15 Broad St., N. Y. City. Due Service of a Copy of the within Writ of Error is hereby admitted. Dated 16 day of January 1917. Chas. C. Sanders, Att'y for defendant in error. Received Jan. 22, 1917.

309 Supreme Court of the United States.

At Law.

ERIE RAILROAD COMPANY, Plaintiff-in-Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant-in-Error.

Petition for Writ of Error.

The petition of Erie Railroad Company by Stetson, Jennings & Russell, its attorneys, hereby sets forth that on or about the 12th day of December, A. D. 1916, the Supreme Court of the State of New York, made and entered a final order and judgment herein upon the remittitur from the Court of Appeals of the State of New York in favor of Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, the defendant-in-error herein, and against the Erie Railroad Company, the plaintiff-in-error herein, in which final order and judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the Erie Railroad Company, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the State of New York upon the remittitur from the Court of Appeals of the State of New
310 York is the highest court of the said State of New York in which a decision in this suit and this matter could be had.

Wherefore Erie Railroad Company petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of New York for the correction of errors so complained of, and that a transcript of

record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 4th day of January, A. D. 1917.

STETSON, JENNINGS & RUSSELL,
Attorneys for Erie Railroad Company, Plaintiff-in-Error.

Office and P. O. Address, 15 Broad Street, Borough of Manhattan, City of New York, New York.

STATE OF NEW YORK,
County of New York, ss:

David Bosman, being duly sworn, deposes and says that he is an officer of Erie Railroad Company, plaintiff-in-error above named, to wit: the Vice President & Secretary thereof; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

DAVID BOSMAN.

Sworn to before me this 4th day of January, 1917.

[Seal William H. Bruder, Notary Public, Bronx County.]

WM. H. BRUDER,
Notary Public, Bronx County, No. 35.

Certificate filed in New York County, No. 46.

310½ [Endorsed:] Supreme Court of the United States. Erie Railroad Company, Plaintiff-in-Error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, Defendant-in-error. Original. Petition for Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiff-in-error, 15 Broad Street, Borough of Manhattan, City of New York, New York. Due Service of a Copy of the within petition for writ of error is hereby admitted. Dated 16 day of Jan. 1, 1917. Chas. C. Sanders, Att'y for Def't in Error.

311 Supreme Court of the United States.

At Law.

ERIE RAILROAD COMPANY, Plaintiff-in-Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant-in-Error.

Assignment of Errors.

Now comes Erie Railroad Company, plaintiff-in-error, and respectfully submits that in the record, proceedings and final judgment of the Supreme Court of the State of New York upon the remittitur from the Court of Appeals of the State of New York, in a cause wherein Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, is plaintiff and Erie Railroad Company is defendant, there is manifest error in this, to wit:—

First. The said Court erred in holding that the Imperial Russian Consul-General at New York, acting by P. d'Adomovitsch, Vice-Consul, had no authority under the Treaty between the United States of America and His Majesty the Emperor of all the Russias, concluded December 18, 1832, nor under the Treaty between the United States of America and His Catholic Majesty the King of Spain concluded July 3, 1902, both Treaties being in full force and effect during the year 1909, to represent the absent, unknown
312 or minor heirs, next of kin or legal representatives of Stephen Mistschook, deceased.

Second. The said Court erred in holding that the Imperial Russian Consul-General at New York, acting by P. d'Adomovitsch, Vice-Consul, had no authority under the said Treaty between the United States of America and His Majesty the Emperor of all the Russias, concluded December 18, 1832, nor under the Treaty between the United States of America and His Catholic Majesty the King of Spain concluded July 3, 1902, both Treaties being in full force and effect during the year 1909, to compromise, settle, release and discharge the claim or claims, cause or causes of action, in favor of the absent, unknown or minor heirs, next of kin or legal representatives of said Stephen Mistschook, deceased, arising out of or by reason of the death of the said Stephen Mistschook, deceased.

Third. The said Court erred in deciding against the validity of the authority exercised under the United States by said Imperial Russian Consul-General at New York, acting by P. d'Adomovitsch, Vice-Consul.

Fourth. The said Court erred in holding that in the provisions contained in Article VIII of said treaty between the United States

of America and His Majesty the Emperor of all the Russias, and in Article XXVII of the said Treaty between the United States of America and His Catholic Majesty the King of Spain, the said Governments contemplated the assured conservation, administration and settlement of the estates of the citizens of either who died in the country of the other, or dying at sea, left property which was brought into the country of the other.

313 Fifth. The said Court erred in holding that by the said provisions of the said Treaties the said citizens are to be represented only as to the ownership or interest which they may have under the laws of intestacy in the estate of the deceased.

Sixth. The said Court erred in holding that the said provisions of the said Treaty between the United States of America and His Catholic Majesty the King of Spain are ambiguous and that their meaning is uncertain and not clear.

Seventh. The said Court erred in holding that under the said provisions of the said Treaties the existence of an estate of the intestate in the consular district is the ground for the right to represent.

Eighth. The said Court erred in holding that said provisions of the said Treaties denote that the intention of the said Governments was to provide for the safeguarding of the property and the settlement of the estates of the citizens of either dying in the country of the other, or at sea.

Ninth. The said Court erred in holding that the said provisions of the said Treaties have a completed purpose and effect if it be held to authorize the consular officers to act for the absent, unknown or minor heirs, next of kin or legal representatives of their deceased countrymen in relation to the latter's estates in instituting, appearing for and participating in their behalf in legal and other proceedings for the proper administration, conserving and guarding of the estates.

314 Tenth. The said Court erred in holding that the said provisions of the said Treaties did not permit the consular officers to transfer, dispose of, or convert into a different form the property of the absent, unknown or minor heirs or next of kin of the citizens or subjects of their country who shall die within their consular jurisdiction.

Eleventh. The said Court erred in holding that the language of the said provisions of the said Treaties and the rules controlling their interpretation, forbid the construction given thereto by the plaintiff-in-error herein.

Twelfth. The said Court erred in causing judgment to be entered in favor of said Walter G. Hamilton, County, Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, and against said Erie Railroad Company.

Thirteenth. The said Court erred in affirming the said judgment in favor of the said Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, and against said Erie Railroad Company.

Fourteenth. The said Court erred in holding that there was no meritorious exception on the part of said Erie Railroad Company to the rulings of the Trial Justice in admitting or rejecting evidence.

Fifteenth. The said Court erred in not causing judgment to be entered in favor of said Erie Railroad Company and against said Walter G. Hamilton, County Treasurer of the County of
315 Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased.

Wherefore Erie Railroad Company prays that the judgment or decision aforesaid may be reversed and annulled, and for such other and further relief as may be proper and just.

STETSON, JENNINGS & RUSSELL,
Attorneys for Erie Railroad Company, Plaintiff-in-Error.

Office and P. O. Address, 15 Broad Street, Borough of Manhattan, City of New York, New York.

[Endorsed:] Supreme Court of the United States. Erie Railroad Company, Plaintiff-in-Error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, Defendant-in-error. At Law. Original. Assignment of Error. Stetson, Jennings & Russell, Attorneys for Plaintiff-in-error, 15 Broad Street, Borough of Manhattan, City of New York, New York. Due service of a Copy of the within Assignment of Error is hereby admitted. Dated 16 day of Jan., 1917. Chas. C. Sanders, Attorney for Def't in Error.

316 UNITED STATES OF AMERICA, *ss:*

To Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the goods, chattels, and credits of Stephen Mistschook, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Erie Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this eleventh day of January, in the year of our Lord one thousand nine hundred and seventeen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

316½ [Endorsed:] Supreme Court of the U. S. October Term, 1916. Erie Railroad Company, Plaintiff in Error, v. Walter G. Hamilton, County Treasurer, etc., Defendant in Error. Original. Citation. Stetson, Jennings & Russell, No. 15 Broad Street, New York, Solicitors for Plaintiff-in-Error. Due Service of a Copy of the within citation is hereby admitted. Dated 16 day of Jan., 1917. Chas. C. Sanders, Solicitor for Defendant in Error.

317 American Surety Company of New York.

Company's Office Building, 100 Broadway, New York.

Capital $5,000,000.

Supreme Court of the United States.

ERIE RAILROAD COMPANY, Plaintiff in Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant in Error.

Know all men by these presents, that we, Erie Railroad Company, of 50 Church Street, New York City, as Principal and American Surety Company of New York, a corporation, as Surety, are held and firmly bound unto Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, in the full and just sum of ten thousand and 00/100 dollars ($10,000) to be paid to the said Walter G. Hamilton, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30th day of December, in the year of our Lord, one thousand nine hundred and sixteen.

Whereas, the above bounden, Erie Railroad Company is about to petition and pray to the Supreme Court of the United States that a writ of error may be issued in this behalf to the Supreme Court of the State of New York, for the correction of errors complained of, and also that a transcript of record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Now, therefore, the condition of the above obligation is such, that if the petition and prayer of said Erie Railroad Company be granted, and if the said Erie Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its

plea good, then the above obligation to be void; otherwise to be and remain in full force and virtue.

[Seal Erie Railroad Company.]

ERIE RAILROAD COMPANY,
By DAVID BOSMON, *Vice President.*

[Seal American Surety Company of New York.]

AMERICAN SURETY COMPANY
OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice President.

Attest:
LOUIS PAPEN, Esq.,
Resident Assistant Secretary.

318 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of January, 1917, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in the city of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with Louis Papen and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Louis Papen subscribed to the said instrument is in the genuine handwriting of the said Louis Papen and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[Seal William C. Lloyd, Notary Public, Kings County, N. Y.]

W. C. LLOYD,
Notary Public, Kings County.

Ctf. filed in N. Y. Co., N. Y. Co. No. 24; Kings Co. No. 19, Kings Co. Reg. No. 8021; N. Y. Co. Reg. No. 8059; Certificates filed in all counties. Term expires March 30th, 1918.

319 STATE OF NEW YORK,
County of New York, ss:

Wm. H. Bishop, being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York;

that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

WM. H. BISHOP.

Subscribed and sworn before me this 2nd day of Jan., 1917.

[Seal William C. Lloyd, Notary Public, Kings County, N. Y.]

W. C. LLOYD,
Notary Public, Kings County.

Ctf. filed in N. Y. Co., N. Y. Co. No. 24; Kings Co. No. 19, Kings Co. Reg. No. 8021; N. Y. Co. Reg. No. 8059; Certificates filed in all counties. Term expires March 30th, 1918.

Form G 362.
Company's Office Building, 100 Broadway, N. Y.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement, September 30, 1916.

Resources.

Real estate:	
Home Office Building and Land, unencumbered	$3,200,000.00
N. Y. City Water Front, unencumbered	215,000.00
	$3,415,000.00
Appraised value by N. Y. Insurance Dept.	
Stocks and Bonds, Market Value	4,555,551.25
Mortgage and Collateral Loans, Judgments and Decrees	444,100.86

Cash in Banks and Offices		918,563.58	
Premiums in Course of Collection	$861,772.53		
Less amount 3 months or more old	331,751.40		
		530,021.13	
Accrued Interest and Rents		49,748.31	
Salvage Recoverable		148,413.20	
			$10,061,398.33

Liabilities.

Capital Stock	$5,000,000.00	
Surplus and Undivided Profits	1,932,493.39	
Reserve for Unearned Premiums	2,133,519.50	
Reserve for Contingent Claims	777,315.25	
Reserve for Expenses and Taxes	144,242.60	
Reinsurances and Accounts Payable not due	46,971.24	
Premiums Paid in Advance	26,856.35	
		$10,061,398.33

Special Deposits, required by insurance laws of various States, not considered.

320 American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1916, at eleven o'clock a. m.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 7, 1915, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * * * *

Place.	Resident Vice-Presidents.	Resident Assistant Sec's.
New York, N. Y.	Marshall L. Brower	Marshall L. Brower
	A. E. Cotterell	William H. Bishop
	William M. Tomlins, Jr.	A. E. Cotterell
	Lester S. Moore	Charles S. Waterbury
	William H. Bishop	Daniel Stewart
	George R. Crosby	E. D. Sadler
	W. H. E. Reinecke	George R. Crosby
		W. H. E. Reinecke
		E. J. Sabater
		Louis Papen
		Harold R. Ward
		Benjamin A. Willis
		Robert L. Neptune

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 22nd day of January, 1916.

[Seal American Surety Company, New York.]

W. H. RILEY,
Assistant Secretary.

[Endorsed:] Supreme Court of the U. S. Erie Railroad Company, Plaintiff in Error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Defendant in Error. Original. Bond. Stetson, Jennings & Russell, Solicitors for Plaintiff in Error, 15 Broad St., N. Y. City. I approve of the within undertaking both as to form and sufficiency of the surety. Louis D. Brandies, Associate Justice, Supreme Court of the U. S. January 11, 1917.

Due Service of a Copy of the within is hereby admitted.
Dated 16 day of Jan., 1917.

CHAS. C. SANDERS,
Att'y for Def't in Error.

321 Supreme Court of the United States.

At Law.

ERIE RAILROAD COMPANY, Plaintiff in Error,

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of Stephen Mistschook, Deceased, Defendant in Error.

Order of Allowance of Writ of Error.

The above entitled matter coming on to be heard upon the petition of the plaintiff-in-error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York, and upon examination of said petition and the record of said matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be and is hereby allowed from this court to the Supreme Court of the State of New York; that the writ of error operate as supersedeas, and that the bond presented by the said petitioner be and the same is hereby approved.

LOUIS D. BRANDIES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. Erie Railroad Company, Plaintiff in error, against Walter G. Hamilton, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased, Defendant in error. Original. Order of Allowance of Writ of Error. Stetson, Jennings & Russell, Attorneys for Plaintiff in error, 15 Broad Street, Borough of Manhattan, City of New York, New York. Due Service of a Copy of the within order of allowance of Writ of Error is hereby admitted. Dated 16 day of Jan., 1917. Chas. C. Sanders, Att'y for Def't in Error.

322 WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator, etc., of Stephen Mistschook, Deceased, Respondent,

against

ERIE RAILROAD COMPANY, Appellant.

(Decided November 28, 1916.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1915, affirming a judgment in favor of the plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

William C. Cannon, Frederic B. Jennings, for appellant.

Frederic C. Scofield, Herbert Smyth & Frederic W. Bisgood, for respondent.

COLLIN, *J.*:

The plaintiff seeks to recover, under the statute (Code of Civil Procedure, sections 1902-1905), the damages for a neglect of the defendant through which his intestate was killed while crossing, upon a highway, the tracks of defendant. The entire evidence at its close was submitted to the trial justice through motions for a dismissal of the complaint, the direction of a verdict for the defendant,
323 and the direction of a verdict for the plaintiff. The justice directed a verdict in favor of the plaintiff. The consequent judgment was unanimously affirmed by the Appellate Division. The chief judge of this court granted the defendant leave to appeal to it.

The tracks of the railroad at the highway crossing ran easterly and westerly. The intestate, in a farm wagon drawn by a team of horses which he was driving, stood on the southern side of and about twenty feet from the east-bound or southern track, while a west-bound freight train passed on the west-bound or northern track over the crossing & then drove upon the crossing. The evidence permitted the trial judge to find: The engine of an east-bound passenger train going at

the rate of fifty miles an hour collided with the wagon at five o'clock and forty minutes in the morning of March 3, 1909; the sun had not risen and a mist or fog prevailed; the crossing was unprotected except for an automatic electric signal bell, which was out of order and was ringing and rang continuously; no warning of the approach of the east-bound train was given by the sounding of the bell or whistle of its engine, and the passing freight train made considerable noise. Those findings supported the conclusion that the defendant was negligent.

The view of the intestate toward the west, as he stood waiting for the passing of the freight train, and as he passed on northerly to a point about ten or fifteen feet from the east-bound track, was obstructed; the heads of the horses were twelve or fourteen feet north of the intestate, and the horses were upon the east-bound track at the time the intestate could first have seen the approaching engine; the engine was not less than one hundred and twenty-five feet and not more than two hundred and twenty-five feet from the cross-
324 ing, and was traveling at the rate of about seventy-three feet in a second at the time the intestate could have first seen it or the train. While the evidence in regard to the view of the approaching train practicable to the intestate was in direct contradiction, it supports as facts those statements. Our decision in Parsons v. Syracuse B. & N. Y. R. R. Co. (205 N. Y. 226, 228) is an authority upholding the trial court in finding that the intestate was free from contributory negligence. In that case Judge Hiscock, writing for the court, after stating that the case was submitted to the jury upon two theories, the first of which was, it was the duty of the intestate to "look and listen only in the event that the jury should find from the evidence in this case that it would have availed him had he looked and listened," said: "I think that the evidence justified the court in submitting the case to the jury on the first theory. Taking into account the speed of the engine, the absence of the usual signals either of sound or light, the character of the night and the obstructions to the view, the jury might have found that the exercise of reasonable care by intestate in looking and listening for the approach of a train would not have enabled him to detect the approach of this light engine in time to escape the collision and, therefore, have relieved him from the imputation of contributory negligence."

The appeal presents the more serious question, whether or not there had been a valid settlement and release of the cause of action by the beneficiaries of it, through and by the acts of the Imperial Russian consul-general at New York. On October 6, 1909, the defendant paid the Imperial Russian consul-general, through the vice-consul, four hundred dollars in full settlement of all
325 claims and demands against it for the death of the intestate and the consul-general executed and delivered to the defendant a receipt of the amount "in full settlement of all claims and demands against the company for the death" of the intestate, and, in the name of the widow "as wife and Admx.," a release "for myself, my heirs, my executors, administrators and assigns" from all claims and demands arising or growing out of the death. The next of kin

of the intestate were three infant children residing with their mother in the village of Ozero, province of Volhynia, Russia. The four hundred dollars were paid to the Russian authorities of that province and by them deposited in a local bank to the credit of the heirs of the intestate. The appellant asserts and argues that the transaction constituted, by virtue of a power given the consul-general by the treaty to be referred to, a settlement of the cause at action.

Through the year 1909, a treaty between the United States and Russia contained the clause: "The two contracting parties shall have the liberty of having, in their respective ports, Consuls, Vice-Consuls, Agents and commissaries of their own appointment, who shall enjoy the same privileges and powers, as those of the most favored nations." The appellant correctly asserts that under this clause the powers of the Russian consul and vice-consul in the matter of settling with and releasing the defendant from the damages arising from the death of the intestate were equal to those given the consular representatives of any other nation by a treaty with the United States, and specifically refers us to the provision of the then existing treaty with Spain:

"The Consuls-General, Consuls, Vice-Consuls or Consular
326 Agents of the respective High Contracting Parties shall have, under the laws of their country and regulations of their own Government so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear. Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to perform all the duties prescribed by the laws of their country and the instructions and regulations of their own Government for the safe-guarding of the property and the settlement of the estate of their deceased countrymen".

An assertion of the respondent is that the record contains no evidence that the deceased was at the time of his death a citizen of Russia or a subject of the Czar of Russia. The complaint alleges: "That the said Stephen Mistschook was at the time of his death a resident of Rockland County and left him surviving a widow and three minor children, Eva Mistschook, Julien Mistschook and Elarion Mistschook, all dependent upon him for support and all aliens resident in Russia, Europe." The answer alleges that the intestate was, at the time of his death a subject of the Emperor of Russia. The counsel for the plaintiff, upon the trial, in the opening of the case to the jury, stated that the intestate came to this country from Russia and had arranged to bring his wife and three
327 children to this country to make them citizens of it. Through a deposition, the widow testified that on March 3, 1909, she was and prior thereto and since November 3, 1896, had been the wife of the intestate; that they were married in the village of Ozero, province of Volhynia, Russia; that they lived at Ozero until 1907,

when the intestate said good-bye to her there, telling her he was going to America. He arrived in the United States about February, 1907. He was thirty-two years old at the time of his death. The record does not disclose the country of his birth. It was thus proven that the intestate was an alien; that at the age of twenty he resided and married, and through the succeeding twelve years resided, in Russia; that his wife and children continued until his death to reside and receive there their support from him, and were aliens. The facts created the presumption that he was, while a resident, a citizen of Russia. The relation is presumed to have continued until a change of citizenship is proved. (Shelton v. Tiffin, 6 How. [U. S.] 163, 185; Hauenstein v. Lynham, 100 U. S. 483; Campbell v. Wallace, 12 N. H. 362; State ex rel. Phelps v. Jackson, 79 Vt. 504.) Moreover, the acts of the Russian consul-general under the treaty created the presumption that the intestate was a citizen or subject of Russia, because otherwise those acts would have been nugatory and mischievous. The acts of a public officer which presuppose the existence of other acts or conditions to make them legally operative are presumptive proofs of the latter. (Bank of United States v. Dandridge, 12
328 Wheat. 64; Cincinnati, New Orleans & Texas Pac. R. Co. v. Rankin, 241 U. S. 319, 327; Swarthout v. Ranier, 143 N. Y. 499, 504; Pringle v. Woolworth, 90 N. Y. 502.) "The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done." (Matter of Marcellus, 165 N. Y. 70, 77.) We conclude from the proofs that the intestate was, at the time of his death, a citizen of Russia. Concededly, he died within the territorial jurisdiction of the consul-general.

We turn next to the question, did the consul-general have the right to settle the cause of action belonging to the widow and next of kin. The alienage of the beneficiaries of the cause of action does not affect their rights under the statute (Alfson v. Bush Co., 182 N. Y. 393) and we will assume for the purposes of this case that the widow and children of the intestate, who under the statute (Code of Civil Procedure, section 1903) constituted the beneficiaries, had the right (the infants being legally represented) to settle the cause of action at any time prior to the issuance of the letters of administration on March 1, 1911. The question presented is, did the consul-general, as such, and without authority from the beneficiaries, have that right.

At the outset it should be comprehended that under our statute the cause of action is created by the statute and *it* original and not derivative. It is not a part of, and has no relation with the estate of the decedent. The damages are allowed, not for an injury
329 to his estate, but for an injury, through the loss of him, to the estate of the beneficiaries. The executor or administrator of the decedent is a mere nominal party, without any interest in the damages, holding them, when recovered, in the capacity of a trustee or agent for the beneficaries. (Hegerich v. Keddie, 99 N. Y. 258; Matter of Meekin v. Brooklyn Heights R. R. Co. 164 N. Y. 145; Kelliher v. New York Central & H. R.

R. R. Co., 212 N. Y. 207.) The claim of the beneficiaries of such a cause of action, in its inherent nature and source, is of the same quality and character as the large class of claims for injuries to the manifold varieties of property of claimants.

The rights of consuls and consular officials rest on international law as well as on treaty stipulations. International law regards them as mercantile agents of the government appointing them, authorized to protect the commercial interests of its citizens or subjects in the country to which they are accredited and clothed only with authority for commercial purposes; to conserve and guard the property within their territorial jurisdiction of their countrymen dying therein is important among their rights and duties. (The Anne, 3 Wheat. 435; Seidel v. Peschkaw, 27 N. J. L. 427; Matter of D'Adame, 212 N. Y. 214.) While it vests them with the right to interpose claims for the restitution of property belonging to the subjects of their own country, I have found no rule of international law or judicial decision indicating that it authorizes or permits them to dispose of, control or convert into another form the uninvaded and secure property of their living countrymen. The decision and opinion in The Bello Corrunes (6 Wheat. 152, 168) upholds the contrary conclusion. It is clear, I think, that the general
330 law of nations does not sustain as valid the settlement with the appellant of the consul-general, and this conclusion is assured by the fact that the counsel for the appellant does not invoke here that law. Nor has he brought to our attention any law of Russia or of this country supplementing, in this respect, international law. The treaty between the United States and Russia, in conjunction with that between the United States and Spain, of which we have already spoken, is the foundation of his claim and argument.

The Federal Constitution declares a valid treaty the supreme law of the land. (Article VI) Where a treaty affects the rights of litigants, it binds those rights and is as much to be regarded by the court as an act of Congress. (United States v. Schooner Peggy, 1 Cranch, 103; Whitney v. Robertson, 124 U. S. 190; Maiorano v. Baltimore & Ohio R. R. Co., 213 U. S. 268.) It is paramount to the Constitution and statutes of the state (Ware v. Hylton, 3 Dallas, 199, 237), but not to acts of Congress. (Head Money Cases 112 U. S. 580.) Its application to any case and its construction, if construction is needed, are, as with any other law, questions for the court.

The particular language of the Spanish treaty which, the appellant asserts, gave the consul-general the right to settle the claim, is that giving to consular officers "the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdictions; * * * and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or representatives shall themselves appeal * * * so far as compatible with
331 local laws." The argument is, the right of "representing" is the right to do for the represented persons whatsoever they

might have done for themselves, and the clauses quoted contemplate a representation without as well as with judicial proceedings. No legislative or judicial law of Russia or the state forbade the representation.

It is manifest that the language does not clearly and with certainty warrant the application and effect given it by the appellant. It is not clear that the language has any application to the widow and children of the intestate as the owners of the claim or property, which is theirs not by devolution or succession and as a part of the estate of the intestate, but through original and primary ownership. Our inquiry, therefore, is as to what, in such respect, was intended in the quoted language by the contracting governments, and in pursuing it we should adopt the same general rules, which are applicable in the construction of statutes, contracts and written instruments generally. The entire provisions of the treaty relevant to the inquiry are to be studied, the words used are to be given their natural and ordinary signification, a sensible and reasonable effect must be given unless the words forbid, and the cognate rules of international law and of the legislation of the government may be considered. (Matter of D'Adamo, 212 N. Y., 214; United States v. Choctaw, etc., Nations, 179 U. S. 494; Collins v. O'Neil, 214 U. S. 113; Geofroy v. Riggs, 133 U. S. 258.) A careful reading of the provisions of the treaty impels to the conclusion that the governments contemplated the assured conservation, administration and settlement of the estates of the citizens of either who died in the country of the other, or dying at sea, left property which was brought into the country of the other. It is the heirs, next of kin or
332 legal representatives of such citizens who are to be represented and represented as such; that is, as having an ownership or interest under the laws of intestacy in the estate of the deceased. They are to be represented as to such ownership or interest. The widow and children in the case at bar are not the subjects of such a representation. While the statute declares that the damages recovered are exclusively for the benefit of the decedent's husband or wife, and next of kin, the denomination "next of kin" in connection with the preceding designation is merely a convenient means of designating comprehensively and definitely, the distributees of the damages recovered. The damages are theirs, not through the laws of intestacy, or as a part of the estate of the intestate, but through their original right to them created by the statute. A confirmation of the correctness of such conclusion is contained in the provision that as to the countrymen of consuls who die at sea, the right of representation is not given unless the property of the deceased is brought into the consular district. The existence of an estate of the intestate in the consular district is the ground for the right to represent. The remaining language of the treaty provision denotes that the intention of the governments was to provide by it for the safeguarding of the property and the settlement of the estates of the citizens of either dying in the country of the other or at sea. The language has a completed purpose and effect if it be held to authorize the consular officers to act for the heirs, next of kin or legal repre-

sentatives of their countrymen, of the description set forth, in relation to their estates in instituting, appearing for and par-
333 ticipating in their behalf in legal or other proceedings for the proper administration, conserving and guarding of the estates. This construction is further confirmed by the fact that it harmonizes with the functions of consuls under the established international practice. (Matter of D'Adamo, 212 N. Y. 214.)

The construction urged by the appellant is not reasonable. It would permit consular officers to transfer, dispose of, or convert into a different form the property of the absent, unknown or minor heirs or next of kin of the citizens or subjects of their country who shall die within their consular jurisdiction. The vice-consul effected such a result in the present case. The right of action was a property right of the beneficiaries of it. (Matter of Meekin v. Brooklyn H. R. R. Co., 164 N. Y. 145.) The consul converted it into four hundred dollars. The construction urged by the appellant would justify his act. There is no distinction between the property right in question and the other property rights, if any, of the beneficiaries or those of others similarly situated which would guard them against the effect of such a construction. The death of a fellow-countryman of a consular officer within the consular district would place at the disposal — the officer the property of the absent, unknown or minor heirs and next of kin of the deceased. The treaty in question is one of many between this and other countries containing identical or equivalent language to which our decision would be applicable. The language and the rules controlling its interpretation forbid the construction given by the appellant.

There is no meritorious exception on the part of the appellant to the rulings of the trial justice in admitting or rejecting evidence.

334 The judgment should be affirmed with costs.

Willard Bartlett, Ch. J., Hiscock, Chase, Hogan, Cardozo and Pound, JJ., concur.

Judgment affirmed.

335 STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York, for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 22nd day of January, 1917, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 334 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of Walter G. Hamilton, County Treasurer of the County of Rockland as Public Administrator of the goods, chattels and credits of Stephen Mist-

schook, deceased, plaintiff-respondent, against Erie Railroad Company, defendant-appellant, mentioned in said Writ of Error as the same remain of record and on file in my office:

And that annexed hereto is the petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 24th day of January, 1917.

[Seal of the County of New York.]

WM. F. SCHNEIDER, *Clerk*.

Endorsed on cover: File No. 25,733. New York Supreme Court. Term No. 903. Erie Railroad Company, plaintiff in error, vs. Walter G. Hamilton, County Treasurer of the County of Rockland, as public administrator of the goods, chattels & credits of Stephen Mistschook, deceased. Filed January 30th, 1917. Flie No. 25,733.

FILED
DEC 10 1918
JAMES D. MAHER
CLERK.

Supreme Court of the United States

October Term, 1918
No. 112

ERIE RAILROAD COMPANY

Plaintiff-in-Error
(Defendant below)

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, deceased.

Defendant-in-Error
(Plaintiff below)

BRIEF FOR THE ADMINISTRATOR
Defendant-in-Error

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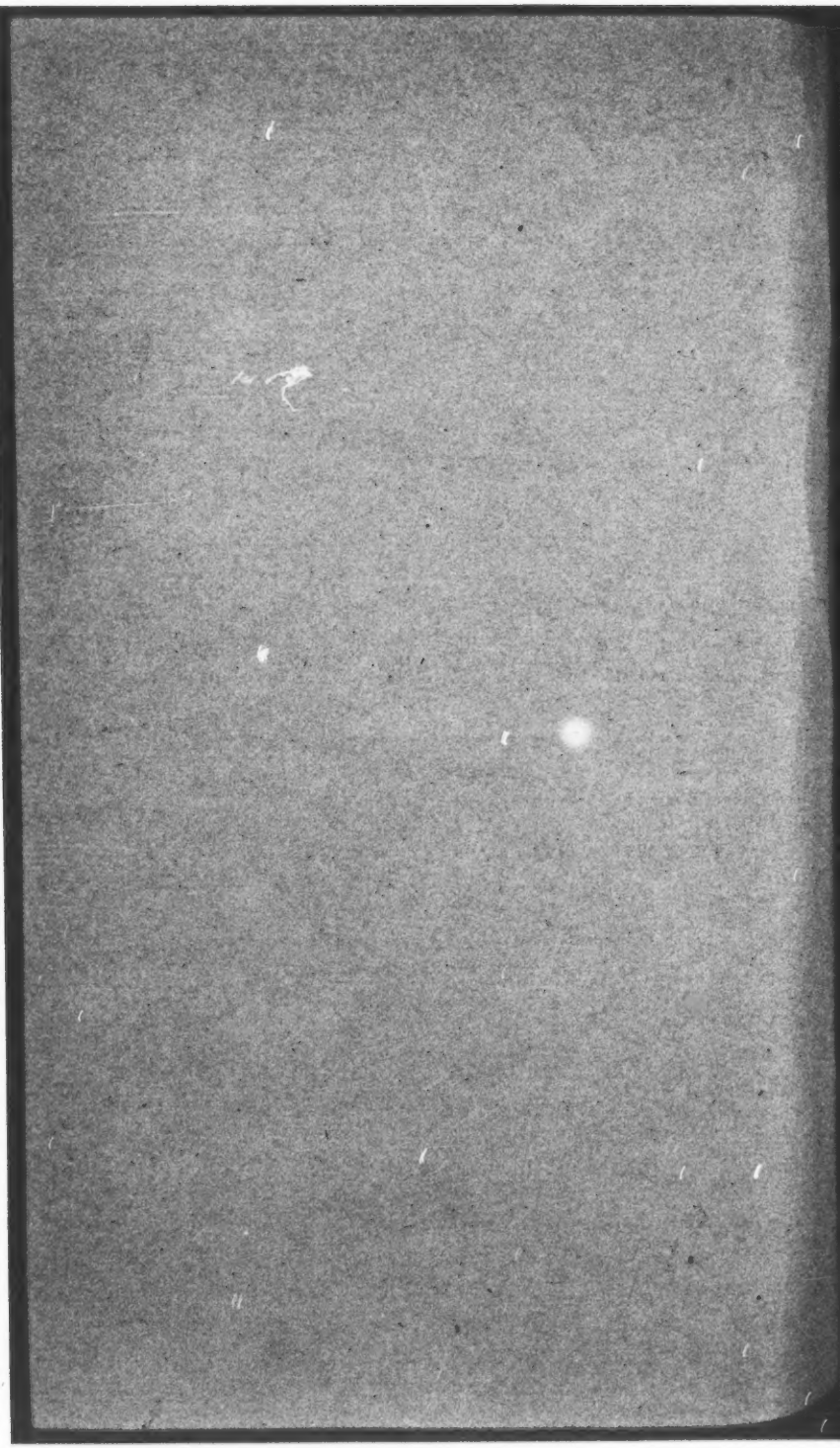

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United States Supreme Court

October Term, 1918.

No. 112.

ERIE RAILROAD COMPANY,

Plaintiff-in-Error,
(Defendant below)

against

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the goods, chattels and credits of Stephen Mistschook, deceased.

Defendant-in-Error,
(Plaintiff below)

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

This action comes to this court on a writ of error to the Court of Appeals of the State of New York. The action was brought to recover damages in behalf of the widow and three minor children for the death of Stephen Mistchook, the husband and father, a citizen and former resident of Russia, where his family still resided at the time of his death.

The plaintiff-in-error, prior to the appointment of the administrator, attempted to settle the claim with the Russian Consul, without the interposition of the court, or the appointment of an administrator.

The claim for which judgment has been rendered in the present action for $8066.86, was alleged to have been settled with the Consul for $400.

The question brought to this court by the writ of error is whether or not, under the treaty with Spain, invoked by the "favored nation" paragraph in the Russian Treaty, such settlement was within the consular powers of the Russian Consul, and binding upon the defendant-in-error, as administrator, and therefore a bar to and release of the cause of action set forth in the complaint.

The New York Code of Civil Procedure read, in 1909 as follows:

> "Section 1902. The executor or administrator of a decedent who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death.
>
> "Section 1903. The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

The particular portion of the Spanish Treaty

invoked is the Twenty-seventh Article of the Spanish Treaty of July 3, 1902, which reads:

"Article XXVII.

"The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own government so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear.

"Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to perform all the duties prescribed by the laws of their country and the instructions and regulations of their own government for the safe-guarding of the property and the settlement of the estate of their deceased countrymen.

"In every case the effects and property of such deceased citizens or subjects shall be retained within the consular district for twelve calendar months by said Consuls-General, Consuls, Vice Consuls or Consular Agents or by the legal representatives or heirs of the deceased during which time the creditors, if any, of the deceased shall have the right to present their claims and demands against the said effects and property, and all questions arising out of such claims or demands shall be decided by the local judicial authorities in accordance with the laws of the country to which said officers are commissioned."

The Twenty-first Article of the same treaty reads:

"XXI.

"The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two High Contracting Parties, shall have the right to address the authorities of the respective countries, national or local, judicial or executive, within the extent of their respective consular districts, for the purpose of complaining of any infraction of the treaties or conventions existing between the two countries, or for purposes of information, or for the protection of the rights and interests of their countrymen, whom, if absent, such consular officers shall be presumed to represent.

"If such application shall not receive proper attention, such consular officers may, in the absence of the diplomatic agent of their country, apply directly to the government of the country to which they are commissioned."

The question was presented by the fourth and fifth paragraphs of the plaintiff-in-error's amended answer (record, pp. 6-7) and the evidence thereunder is found in the deposition of the widow (pp. 16-17), where she refused to accept the $400. tendered by the Russian official and stated she authorized the present action; and in defendant's (plaintiff-in-error's) exhibits H, I and J, offered in evidence at page 109 and set forth in the record at pp. 192-196, being the consular appointment, voucher and release.

Argument.

Point I.

The claim for damages for death of decedent is original and not derivative. It forms no part of the estate of decedent.

Point II.

The general consular authority to represent nationals does not extend to the compromise and conversion of their original property.

Point III.

The Twenty-seventh Article of the Spanish Treaty of July 3, 1902, prescribes the consular powers relating solely to the settlement of estates of deceased countrymen.

Point IV.

The consular settlement was unauthorized by the second paragraph of the 27th Article of the Spanish Treaty.

Point V.

The Twenty-first Article of the Spanish Treaty prescribes the consular power to represent nationals in other matters than the settlement of estates.

Point VI.

The consular settlement in the case at bar was without authority and was therefore a nullity and properly disregarded by the court below.

Point VII.

The judgment should be affirmed.

POINT I.

The claim for damages for death of decedent is original and not derivative. It forms no part of the estate of decedent.

The Court below said (Record, pp. 222-223):

> "At the outset it should be comprehended that under our statute the cause of action is created by the statute and is original and not derivative. It is not a part of, and has no relation with the estate of decedent. The damages are allowed, not for an injury to his estate, but for an injury, through the loss of him, to the estate of the beneficiaries. The executor or administrator of the decedent is a mere nominal party, without any interest in the damages, holding them, when recovered, in the capacity of a trustee or agent for the beneficiaries."

Citing:

Hegerich vs. Keddie, 99 N. Y., 258;
Meekin vs. B. H. R. R., 164 N. Y., 145;
Kelliher vs. N. Y. C. & H. R. R.R. Co., 212 N. Y., 207.

> "The claim of the beneficiaries of such a cause of action, in its inherent nature and source, is of the same quality and character as the large class of claims for injuries to the manifold varieties of property of claimants."

Again at page 224:

> "While the statute declares that the damages recovered are exclusively for the benefit of the decedent's husband or wife, and next of kin, the denomination 'next of kin' in connection with the preceding designation is merely a convenient means of designating comprehensively and definitely, the distribu-

> tees of the damages recovered. The damages are theirs, not through the laws of intestacy, or as a part of the estate of the intestate, but through their original right to them created by the statute."

No conflict with the Federal Constitution or laws being involved, this construction of the state statute will be accepted by this court as conclusive.

> *Memphis Street Ry. Co., vs. Moore,* 243 U. S., 299;
> *Elmendorf vs. Taylor,* 10 Wheat., 152, 159;
> *Old Colony Trust Co., vs. Omaha,* 230 U. S., 100, 116;
> *Great West. Tel. Co., vs. Purdy,* 162 U. S., 329;
> *Burgess vs. Seligman,* 107 U. S., 20, 33;
> *Kuhn vs. Fairmount Coal Co.,* 215 U. S., 349, 358.

In fact plaintiff-in-error itself adopts that construction.

Brief of Plaintiff-in-error, Point II, page 12.

The interposition of an administrator is merely for convenience and does not change the character of the property. Many States (Pennsylvania for example) give the right of action direct to the beneficiaries.

POINT II.

The general consular authority to represent nationals does not extend to the compromise and conversion of their original property.

Defendant-in-error has no quarrel with the powers defined by the text-books quoted in Point one, pp. 6 and 7, of the Brief of plaintiff-in-error.

In fact, learned counsel for the plaintiff-in-error have failed to present to the Court a single citation of an instance where a consul has exercised authority to compromise, convert and release a chose in action belonging to a national.

The inherent functions of a consul are those of a provisional conservator.

> *Matter of D' Adamo,* 212 N. Y., 214, 223;
> *The Anne,* 3 Wheat, 435;
> *Seidel vs. Peschkaw,* 27 N. J. L., 427.

Mr. Webster and Mr. Wheaton contended in the *Bello Corrunes* case, that a consul's character was more like an attorney at law than an attorney in fact.

The Court in that case, 6 Wheat, 152, 167, said:

> "A vice-consul, duly recognized by our government is a proper party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns * * *. *Whether the powers of the vice-consul shall in any instance extend to the right to receive*

in his national character, the proceeds of property libeled and transferred into the registry of a court is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect must ever depend upon the laws of the country from which and to which, he is deputed."

The Court there directed the proceeds to be paid into the registry, to be paid over, under order of the court, to the Spanish owners.

Most of the decisions cited by plaintiff-in-error are instances where the consul has intervened in Court, in order to have the rights of his national protected and determined by judicial procedure in accordance with the rules of the forum having jurisdiction thereof.

The Bello Corrunes, 6 Wheat., 152;
London Packet, 1 Mason, 14;
Rowe vs. The Brig, 1 Mason, 372;
The Anne, 3 Wheat., 435;
Divina Pastora, 4 Wheat., 52;
The Antelope, 10 Wheat., 66;
The Adolph, 1 Fed. Cas., 87;
The Elizabeth, Fed. Cas., 4350;
The General McPherson, 100 Fed. Rep., 864;
In re Holmberg, 193 Fed. Rep., 260;
Von Thodorovich vs. Franz Josef Beneficial Assn., 154 Fed. Rep., 911.

The Conserva, 38 Fed. Rep., 431, and *Harrison vs. Vose,* 9 How., 372, are not in point.

In the *Conserva* case, the consul, in the absence of any other representative, presented the claim of his government.

In *Harrison vs. Vose,* the consul was suing in his own right to recover a penalty incurred for violation of consular laws.

In the case of *Vujic vs. Youngstown Sheet & Tube Co.*, 220 Fed. Rep., 390, the consul was only taking into custody a fixed amount determined by statute which was due to his countrymen and he applied to the Court for such relief.

The various administration cases have no application to the case at bar, for in each instance the consul in question conformed to judicial procedure.

Matter of Tartaglio, 12 Misc., 245;
Matter of Fattosini, 33 Misc., 18;
Carpigiani vs. Hall, 172 Ala., 287;
Matter of Davenport, 43 Misc., 573.

It is true that some of the courts have gone further than the Bello Corrunes case and recognized the right of the consul to receive and transmit the proceeds belonging to his countrymen.

But whether he has that power is not necessary to be determined in this case. There is a vast difference between an agency to receive and transmit a judicially determined sum, and an agency to convert, compromise and liquidate, without the intervention of a judicial proceeding, the property of the principal.

There is no incongruity in the fact that a Russian consul might be entitled to receive and transmit the proceeds in the case at bar, even though he had already unsuccessfully purported to compromise and release the identical claim. They are two distinct acts, and one might be within the scope of his authority and the other not.

As an illustration, an attorney at law, by virtue of his retainer, is authorized to appear, prosecute or defend an action in behalf of his client, to conduct all proceedings up to the entry of judgment, and collect and satisfy the judgment, *but not for*

less than the amount of the claim or judgment, unless by specific authority of the client.

The cause of action, the claim or demand sued upon, and the subject matter of the litigation are all within the exclusive control of the client; and an attorney may not impair, compromise, settle, surrender or destroy them without his client's consent.

> 6 *Corp. Juris,* 643, 659;
> *Bonnifield vs. Thorp,* 71 Fed. Rep., 924;
> *Holker vs. Parker,* 7 Cranch.. 436;
> *Miocene Ditch Co. vs. Moore,* 150 Fed. Rep., 483;
> *Humphrey vs. Thorp,* 89 Fed. Rep., 66;

No case is cited by counsel where the rights of the national are determined by the consul without intervention of a court.

The quotation of counsel for plaintiff in error in their brief on page 7 is not complete. The following is the complete quotation, the italicized matter being the portion omitted:

> "In the absence of other representatives, consuls are entitled to represent their fellow-countrymen in a foreign court of admiralty without special authority; *though they cannot, without special authority, receive restitution of the property in litigation.*"
>
> 1 Wharton's International Law Digest, Section 117 Chap. 5, citing *The Bello Corrunes,* 6 Wheat., 152.

The same authorities also say:

> "It is no part of the duty of diplomatic or consular officers to attend to the prosecution of private claims of American citizens in foreign countries, especially when the courts of justice are open to them."
>
> Wharton's International Law Digest, Vol. I, Chap. 5 , Section 123, citing Mr.

Evarts, Secretary of State, to Mr. Yoder, May 21, 1880, MMS. Dom. Lit.

"In the absence of specific powers, bestowed by competent authority, a consul has no right to receive the proceeds of property libeled and transferred into the registry of the court."

Wharton's International Law Digest, Vol. 1, Chap. 5, Sec. 124, citing *The Bello Corrunes,* 6 Wheat., 152.

"A consul of the United States has no authority to appoint a curator for an American corporation, which may at the time have in the country in which he resides no competent official upon whom legal service can be made in case of 'legal attacks' upon it."

Moore's Digest of International Law, Vol. 5, pp. 93-94, citing Mr. Gresham, Secretary of State, to Mr. Baker, No. 123, Feb. 5, 1894, MS. Inst. Central America, 237.

It is therefore submitted that a consul has no inherent power to convert, compromise, and release the property of his countryman.

POINT III.

The Twenty-seventh Article of the Spanish Treaty of July 3, 1902, prescribes the consular powers relating solely to the settlement of estates of deceased countrymen.

The Twenty-seventh Article of the Spanish Treaty (as given in 33 Statutes at Large, under Treaties and Conventions) in the two languages is as follows:

"ARTICLE XXVII.

The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own Government, so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or l e g a l representatives shall themselves appear.

Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to per-

"ARTÍCULO XXVII.

Los Cónsules Generales, Cónsules, Vice-Cónsules y Agentes Cónsulares de las respectivas Altas Partes Contratantes, tendrán, conforme á las leyes de su pais y á las instrucciones y reglamentos de su propio Gobierno, en cuanto sean compatibles con las leyes locales, el derecho de representar á los herederos ausentes, desconocidos ó menores de edad, parientes inmediatos ó representantes legales de los ciudadanos ó súbditos de su pais, que mueran dentro de su jurisdiccion consular; asi como de aquellos de sus compatriotas que mueran en el mar, cuyos bienes sean llevados á su demarcación consular; y de comparecer personalmente, ó por medio de delegado que los represente en todos los procedimientos relativos al arreglo de sus bienes, hasta que los herederos ó representantes legales comparezcan por si mismos.

Hasta que tenga lugar esta comparecencia podrán dichos funcionarios consulares, en cuanto sea compatible con las leyes locales, cumplir

form all the duties prescribed by the laws of their country and the instructions and regulations of their own Government for the safeguarding of the property and the settlement of the estate of their deceased countrymen.

In every case the effects and property of such deceased citizens or subjects shall be retained within the consular district for twelve calendar months by said Consuls-General, Consuls, Vice-Consuls or Consular Agents or by the legal representatives or heirs of the deceased during which time the creditors, if any, of the deceased shall have the right to present their claims and demands against the said effects and property, and all questions arising out of such claims or demands shall be decided by the local judicial authorities in accordance with the laws of the country to which said officers are commissioned."

todos los deberes prescritos por las leyes de su pais y las instrucciones y reglamentos de su propio Gobierno para la custodia de la propiedad y arreglo de los bienes de su difunto compatriota

En todo caso, los efectos y bienes de los ciudadanos ó súbditos difuntos serán retenidos dentro del distrito consular durante doce meses naturales, por dichos Cónsules-Generales, Cónsules, Vice-Cónsules ó Agentes Consulares, ó por los representantes legales ó herederos del difunto, durante cuyo tiempo los acreedores de aquel, si los hubiere, tendrán derecho para presentar sus reclamaciones y demandas contra dichos efectos y bienes; y todas las cuestiones que se susciten con motivo de estas reclamaciones ó demandas, se decidirán por las autoridades judiciales locales con arreglo a las leyes del pais en que dichos funcionarios están nombrados."

The Court below held that this article related solely to the settlement of estates and not to other property of next of kin of the decedent, and it is argued here that the court erred in so doing.

The Court said (Record, pp. 224-225):

"The language has a completed purpose and effect if it be held to authorize the consular officers to act for the heirs, next of kin or legal representatives of their countrymen, of the description set forth, in relation to their estates in instituting, appearing for, and participating in their behalf in legal or other proceedings for the proper administration, conserving and guarding of the estates. This construction is further confirmed by the fact that it harmonizes with the functions of consuls under the established international practice. (*Matter of D'Adamo,* 212 N. Y., 214.)

"The construction urged by the appellant is not reasonable. It would permit consular officers to transfer, dispose of, or convert into a different form the property of the absent, unknown or minor heirs or next of kin of the citizens or subjects of their country who shall die within their consular jurisdiction. The vice-consul effected such a result in the present case. The right of action was a property right of the beneficiaries of it. (Matter of Meekin vs. Brooklyn H. R.R. Co., 164 N. Y., 145.) The consul converted it into four hundred dollars. The construction urged by the appellant would justify his act. There is no distinction between the property right in question, and the other property rights, if any, of the beneficiaries or those of others similarly situated which would guard them against the effect of such a construction. The death of a fellow-countryman of a consular officer within the consular district would place at the disposal of the officer the property of the absent, unknown or minor heirs and next of kin of the deceased. The treaty in question is one of many between this and other countries containing identical or equivalent language to which our decision would be applicable. The language and the rules controlling its interpretation forbid the construction given by the appellant."

There is a further reason for so holding which

In the case of *Vujic vs. Youngstown Sheet & Tube Co.*, 220 Fed. Rep., 390, the consul was only taking into custody a fixed amount determined by statute which was due to his countrymen and he applied to the Court for such relief.

The various administration cases have no application to the case at bar, for in each instance the consul in question conformed to judicial procedure.

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It is true that some of the courts have gone further than the Bello Corrunes case and recognized the right of the consul to receive and transmit the proceeds belonging to his countrymen.

But whether he has that power is not necessary to be determined in this case. There is a vast difference between an agency to receive and transmit a judicially determined sum, and an agency to convert, compromise and liquidate, without the intervention of a judicial proceeding, the property of the principal.

There is no incongruity in the fact that a Russian consul might be entitled to receive and transmit the proceeds in the case at bar, even though he had already unsuccessfully purported to compromise and release the identical claim. They are two distinct acts, and one might be within the scope of his authority and the other not.

As an illustration, an attorney at law, by virtue of his retainer, is authorized to appear, prosecute or defend an action in behalf of his client, to conduct all proceedings up to the entry of judgment, and collect and satisfy the judgment, *but not for*

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less than the amount of the claim or judgment, unless by specific authority of the client.

The cause of action, the claim or demand sued upon, and the subject matter of the litigation are all within the exclusive control of the client; and an attorney may not impair, compromise, settle, surrender or destroy them without his client's consent.

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> "In the absence of other representatives, consuls are entitled to represent their fellow-countrymen in a foreign court of admiralty without special authority; *though they cannot, without special authority, receive restitution of the property in litigation.*"
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> 1 Wharton's International Law Digest, Section 117 Chap. 5, citing *The Bello Corrunes*, 6 Wheat., 152.

The same authorities also say:

> "It is no part of the duty of diplomatic or consular officers to attend to the prosecution of private claims of American citizens in foreign countries, especially when the courts of justice are open to them."
>
> Wharton's International Law Digest, Vol. I, Chap. 5 , Section 123, citing Mr.

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was not called to the attention of the Court below. As will be shown in Point V. *infra*, Article XXI. of the same treaty prescribed the representative powers of the consul in all other matters. The settlement of estates, however, is a well recognized subject, covered by nearly all treaties between nations.

Bearing in mind that the only divergence in our views on consular powers is the alleged right to convert, compromise and release property rights of the absent next of kin, we now propose to show that such powers are not granted by any specific provision of the treaty.

If the "helpless condition of the absent alien heirs" required protection, Article XXI. and the inherent powers of the consul as a conservator, with a right of intervention, were ample, without attempting to spell such powers from Article XXVII.

The contention of counsel for the plaintiff-in-error, as set forth on page nineteen of his brief, is that:

> "the representation and appearance in proceedings set forth in the first paragraph of the article is a representation and appearance in behalf of living heirs or next of kin of the deceased in respect of *all* their rights arising from the death, and is not in behalf of those persons only in respect of their interest in the estate of, or property left by, the deceased."

The first clause of said first paragraph does merely provide that the Consuls, &c., of the respective high contracting parties shall have the right of representing the absent, unknown or minor heirs, next of kin, etc., of the citizens or subjects of their country who shall die within their consular jurisdiction, etc. It does not expressly state whether such representation shall only be in respect of their interest in the estate of

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the decedent or whether it shall also extend in respect to all the rights and property of said unknown or minor heirs and next of kin. But if we read the first clause of the said paragraph of said Treaty in connection with the second clause, as of course we must, it is clear that the representation referred to in the first clause extends only to the rights of the absent unknown or minor heirs and next of kin in the property left by the decedent. The English version of the second clause of said first paragraph provides that the Consuls shall have the right

> "of appearing either personally or by delegate * * * in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear."

The right of said Consuls, therefore, to represent the heirs and next of kin *in Court* is expressly limited to proceedings relating to the settlement of the estate of decedent, and this being the case, it is submitted that the right of representation *out of Court,* given to the Consuls by the first clause of the first paragraph, is likewise limited to matters relating to the settlement of the estates of their compatriots who die within their Consular jurisdiction, or who die at sea, and whose property is brought within their Consular district.

Counsel for the plaintiff-in-error appreciates the force and strength of this position, and so have endeavored to show that the English version of the said first paragraph of the Treaty is incorrect, and that the right of representation *in Court,* conferred upon said Consuls by the second clause of the first paragraph, extends to all proceedings relating to the settlement of the property of the heirs and next of kin of the decedent.

MISNUMBERED

(a) Their contention is that the Spanish word "bienes" has been improperly translated into the English word "estate".

On this alleged incorrect translation of the word "bienes", counsel for the plaintiff-in-error has worked out an argument as to the meaning of the second clause, which, although plausible if based on the English version of the said Treaty, is entirely contradicted, as we shall presently show, by the Spanish version.

It is true that the Spanish word "bienes" means property, and not necessarily the property of a decedent, but there is no word in the Spanish language exactly equivalent to the English word "estate". In translating the Spanish word "bienes" into English, however, it is customary to use the word "estate", when it is clear from the context that it is the property of a decedent to which the word "bienes" refers.

An example of this is the final clause of the second paragraph:

> "la custodia de la propiedad y arreglo de los bienes de su difunto compatriota."

translated as:

> "the safe-guarding of the property and the settlement of the estate of their deceased countrymen."

There is no reason why the phrase "arreglo de sus bienes" should be translated differently in the one instance than "arreglo de los bienes" in the other. In this last instance it is clearly translated properly, and counsel does not claim otherwise, (See Brief, p. 18). "Settlement of estate" is a clearly defined legal expression; "settlement of property" is not.

(b) Counsel again contend that "que los represente" is improperly translated, "in their behalf", and should have been translated, "who would represent them" (meaning next of kin). (See Brief, p. 17.)

This is also fallacious.

Examining the first paragraph we find "their country", "their own Government", "their country", "their consular jurisdiction", "their countrymen," "their consular district," "in their behalf," in all of which the word "their" relates to the consular officials, and lastly "their estate", where "their" refers to countrymen.

This is confirmed by the Spanish version.

"Represente" is third person singular; the plural is "representen". The subject is the pronoun "que", which refers to the only singular noun "delegado". So the phrase "in their behalf" refers to the delegate appearing in behalf of the consuls, and *not* the consuls appearing in behalf of the next of kin.

In *Rocca vs. Thompson,* 223 U. S., 332, the court said:

> "It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties."

It will thus be seen that by the construction of the Court below, as was said in the opinion, a completed purpose and effect is given.

The general subject might well be held to be:

ESTATES OF DECEASED COUNTRYMEN DYING WITHIN CONSULAR JURISDICTION.

First Paragraph.

Persons to be Represented:

Absent, unknown or minor heirs, next of kin or legal representatives of

(1) Citizens or subjects of their country, dying within consular jurisdiction.

(2) Countrymen dying at sea whose property is brought within the consular district.

Duties:

Representing above persons; and appearing in all proceedings relating to settlement of estate until they or their legal representatives shall appear.

Second Paragraph.

Until appearance, consular officers, compatibly with local laws, perform all duties prescribed by laws of their country, and regulations of their Government for the *safe-guarding of the property* and the *settlement of the estate* of their deceased countrymen.

Third Paragraph.

Prescribes the Procedure:

(1) Effects and property of decedents to be retained within consular district for twelve months;

(2) Creditors to present claims against effects and property within such period;

(3) All questions arising out of such claims to be decided by local judicial authorities

> according to laws of country to which consuls are commissioned.

There is nothing in any of the three paragraphs which prescribes powers, duties or procedure as to other property of the heirs or next of kin.

Basing their argument upon the false premise that this Article comprehends more than the settlement of estates of deceased countrymen, and that the representation of absent next of kin extends to all their property within the consular district, counsel contends, at page 21, that the word "represent" constitutes

> "the Consul the agent of the absent subjects as if with an express power of attorney from them to collect their claims through suit or settlement, as the exigencies of the case should seem to warrant",

and claims for the word "represent" the full effect of the expression "legal representatives".

The phrase "legal representatives", as used in American jurisprudence, contemplates the *alter ego* of the principal, by contract or operation of law, such as an assignee, receiver, executor, administrator or the heirs at law and next of kin as a class.

> *Mutual Life Ins. Co. vs. Armstrong,* 117 U.S., 591, 597;
> *New York Life Ins. Co. vs. Flack,* 3 Md. 341;
> 2 *Bouvier's Law Dictionary* (*Rawle's Revision*), 892.

On the other hand, the word "represent" is to be construed in connection with its use.

Agents, factors, attorneys at law, consuls, officials, directors, all "represent" the parties for

whom they are acting. The scope of authority of each is well defined by law and usage.

And so its use here should be construed in the light of the inherent and treaty-given rights of a consul to represent his nationals.

As has been said before, the representation by a consul is more similar to that of an attorney at law.

This contention is upheld by the decisions in:

Succession of Rabasse, 47 La. Ann., 1452;
Matter of Bristow, 63 Misc., 637.

In the *Rabasse* case, the appointment of an attorney to represent the French heirs was vacated, the consul having appeared in their behalf.

In the *Bristow* case, the appointment of a Special Guardian to represent alien minors was vacated, where an attorney designated by the Consul appeared in their behalf.

The Twenty-Seventh Article does not, therefore, give the Consul the right to convert, compromise and release, without judicial interposition, the other property of the absent next of kin.

POINT IV.

The consular settlement was unauthorized by the second paragraph of the 27th Article of the Spanish Treaty.

So much has been said in the previous Point that this argument will be confined solely to answering Point V. on page 24 of the brief of Plaintiff-in-error.

The second paragraph is limited to performing all prescribed duties

"for the safe-guarding of the property and the

settlement of the estate of their deceased countrymen".

The claim settled was not property of the decedent, either literally or within the spirit of the treaty. Neither was it part of his estate.

The acts of the consul certainly did not savor of conservation.

The alleged settlement occurred October 6th, 1909, about seven months after the death. (Record p. 193.) The Statute of Limitations did not run until March 3rd, 1911.

Sec. 1902, *Code of Civil Procedure, supra.*

No right was imperilled. There was no urgency of action. Seventeen months yet remained within which the next of kin might have caused an administrator to commence action.

The money was deposited in Russia, after the widow's repudiation of the settlement, on March 30th, 1910. (Record, p. 17.) Almost a year yet remained, showing there was no difficulty of communication within the statutory period.

There were no pending proceedings, endangering or threatening to foreclose the rights of the next of kin. Moreover, the right is well-recognized of the consul to have the chose in action judicially determined by the proper local authorities. He could have brought the same action that determined those rights to be worth nearly Eight thousand ($8000) dollars, instead of $400. He could have consulted his countrymen, but instead, without consultation, he practically confiscates their interests, and exceeds his powers.

The record does not show that he even consulted counsel, other than the representatives of the plaintiff-in-error railroad.

Upon such facts, it is scarcely tenable to uphold the consular settlement upon the plea that

"the treaty meant to *protect* the deceased as

to all rights that accrued from his death *to those for whom he cared and whom he might be bound, while living, to support—his wife and minor children.*" (Brief, p. 25.)

POINT V.

The Twenty-first Article of the Spanish Treaty prescribes the consular power to represent nationals in other matters than the settlement of estates.

It reads:

"ARTICLE XXI.

"The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two High Contracting Parties, shall have the right to address the authorities of the respective countries, national or local, *judicial* or executive, within the extent of their respective consular districts, for the purpose of complaining of any infraction of the treaties or conventions existing between the two countries, or for purposes of information, or for the protection of the rights and interests of their countrymen, whom, if absent, such consular officers shall be presumed to represent.

"If such application shall not receive proper attention, such consular officers may, in the absence of the diplomatic agent of their country, apply directly to the Government of the country to which they are commissioned."

This gives the consul the right to address the judicial authorities for the purpose of the protection of the rights and interests of his countrymen, whom, if absent, he shall be presumed to represent.

The powers are thereby prescribed as to the property rights of absent countrymen other than

the settlement of estates of deceased countrymen dying in his consular jurisdiction.

They are again limited to intervention and conservation by means of judicial proceedings..

No right of independent action is given to him.

The representation is for the purpose of addressing the authorities, not of converting the property of the countrymen.

The fact that this Article provides for the protection of other rights of countrymen supports the argument that Article XXVII. does not so provide, rather than the contrary argument urged by counsel at page 20 of the Brief of plaintiff-in-error.

There was no necessity for making provision in both Articles, and the presumption is that each has its separate application.

POINT VI.

The Consular settlement in the case at bar was without authority, and was therefore a nullity, and properly disregarded by the Court below.

Counsel, in their Point IV., page 23, urge that the authority of the Consul having been shown, his action could not be avoided except for cause, such as proof of fraud.

We now urge that his action having been shown to be entirely *without* the scope of his authority, his action was a nullity and should be disregarded.

Again bearing in mind the analogy of an attorney at law and the fact that an attorney at law cannot impair, compromise, settle, surrender or destroy the cause of action of his client without

his consent (Point II. supra), the courts have held that where an unauthorized compromise has been made, the client may ignore it and proceed with the suit or institute a new suit as if no such compromise had ever been made.

6 *Corp. Juris*, 660;
Harper vs. National L. Ins. Co., 56 Fed. Rep., 281.

So here, the Consular settlement was a nullity, and no bar to the present action.

POINT VII.

The judgment should be affirmed.

CHARLES C. SANDERS,
Attorney for Defendant-in-Error.

HERBERT C. SMYTH,
FREDERIC C. SCOFIELD,
CHARLES ANGULO,
Of Counsel.

FILED
DEC 19 1918
JAMES D. MAHER,
CLERK.

-3-

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR (DEFENDANT BELOW),

against

WALTER G. HAMILTON, COUNTY TREASURER OF THE COUNTY OF ROCKLAND, AS PUBLIC ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF STEPHEN MISTSCHOOK, DECEASED, DEFENDANT IN ERROR (PLAINTIFF BELOW).

ANSWER TO SUPPLEMENTAL BRIEF.

There was no error committed by the trial court in rejecting defendant's Exhibits K and L for identification and no error was committed by the Court of Appeals in approving such rejection.

The documents offered consisted merely of an unsworn statement by a peasant that he signed the receipt for the widow, who was illiterate, and at her personal request. This paper was witnessed by an elder and enclosed in a letter of the Governor of the Province. The Russian Consul-General merely certified the English translation to be a correct translation of a Russian document.

The document was not a public record from the files of any public office of the Russian Government. It was merely the rankest hearsay, and all the authentication in the world would not make an inadmissible document admissible.

Authentication merely certifies to the genuineness of the document and the authority of the officials certifying to the same.

Conceding, for the purpose of argument, the genuineness of the document, a mere statement by a peasant that he was requested to sign a receipt by another person, who was illiterate, would not be admissible in evidence upon any theory.

First, it is well settled that the authority of an agent cannot be proven by his own testimony.

Second, if documents of this character were admitted in evidence merely because authenticated as to translation, there would be no necessity of issuing commissions and taking testimony under oath, because all that would be necessary would be to procure an *ex parte* statement of the proposed witness, have the translation authenticated by a consular official, and upon the argument of counsel presented here, such a statement would be admissible.

In *Church vs. Hubbart*, 2 Cranch, 187, at page 237, the court held (quoting syllabus):

> "Foreign laws must be proved like other facts. They must be verified by oath, or by some other such high authority that the law respects not less than the oath of an individual.
>
> "The certificate of a Consul of the United States under his seal is not sufficient. A certificate of the proceedings of a court under the seal of a person who states himself to be the secretary of foreign affairs in Portugal, is not evidence."

The court also said:

> "In this case the edicts produced are not verified by an oath. The Consul has not sworn; he has only

certified if they are truly copies from the original. To give to this certificate the force of testimony it will be necessary to show that this is one of those Consular functions to which, to use its own language, the laws of this country attach full faith and credit.

* * * * * * *

"The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the Consul as well as by his certificate.

"It is asked in what manner this oath should itself have been authenticated, and it is supposed that the Consulate seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the Commissioners have authority to administer oaths, and to certify the depositions by them taken."

Again the court said:

"Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to have been read on the certificate of the Consul. Interpreters are always sworn, and the translation of a Consul not on oath can have no greater validity than that of any other respectable man."

It is also well settled that authentication of private documents does not make them of any greater probative force unless it is shown that the law of the country requires the documents to be deposited or recorded in the office of the official whose certificate is authenticated.

In the case at bar the documents offered do not purport to have been taken from the files of any public office.

Upon all the above grounds it is respectfully submitted that the action of the courts below was proper.

As the supplemental brief of plaintiff in error was served late on December 17th, and did not come to the attention of counsel until the morning of the 18th, it is respectfully requested that if the same is received by the court, counsel for defendant in error may submit a more well-considered reply than has been possible within the short time permitted.

CHARLES C. SANDERS,
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HERBERT C. SMYTH,
FREDERIC C. SCOFIELD,
Of Counsel.

Office Supreme Court, U. S.
FILED
SEP 30 1918
JAMES D. MAHER,
CLERK.

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Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
against (*Defendant below*),

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of STEPHEN MISTSCHOOK, Deceased,
Defendant-in-Error,
(*Plaintiff below*).

Brief for the Erie Railroad Company, Plaintiff-in-Error.

FREDERIC B. JENNINGS,
WILLIAM C. CANNON,
For Plaintiff-in-Error.

C. G. BURGOYNE PRINTING BUSINESS, 72-78 Spring St., New York.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
(Defendant below.)

AGAINST

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Deceased,
Defendant-in-Error,
(Plaintiff below.)

BRIEF FOR ERIE RAILROAD COMPANY.

Statement.

This is a writ of error to review a judgment entered in the New York Supreme Court on a remittitur from the Court of Appeals of that State. The decision of that Court of Appeals was that the 27th Article of the treaty between the United States and Spain, July 3, 1902, 33 U. S. Stat. at Large, Vol. II. (which under the "most favored nation" clause in the Russian treaty applied to Russia) did not authorize the duly

accredited Russian Consul to represent Irene Mistschook, widow of Stephen Mistschook, and their three minor children—the said widow and children being subjects of Russia and residing there—in respect to the claim against the Erie Railroad Company for the death of said Stephen Mistschook and in the settlement of said claim. The facts were that said Stephen Mistschook, an alien and a subject of Russia, was on the 3d day of March, 1909, struck and killed by a train of the Erie Railroad Company at Sloatsburg, New York. In October, 1909, the Russian Consul, at New York, in whose jurisdiction the deceased resided and where his death took place (Transcript of Record, p. 109), and long before the appointment of an administrator, settled the claim of the said widow and children, arising under sections 1902–1905, New York Code of Civil Procedure, giving a receipt and release therefor (Transcript of Record, pp. 109, 110, 193, 194). The relevant parts of these sections as they were in March, 1909, are as follows:

> SECTION 1902. "The executor or administrator of a decedent who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death."
>
> SECTION 1903. "*The damages recovered in an action,* brought as prescribed in the last section, *are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff as if they were unbequeathed assets,* left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue; which must be allowed by the

surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

Under sections 1905, 1870 and 2732 of the Code of Civil Procedure as they were in 1909, the children of the deceased were his next of kin.

On October 6, 1909, the Russian Consul, prior to the appointment of any administrator, evidently impressed with the doubt as to contributory negligence on the part of said Stephen Mistschook—a doubt that the New York Court of Appeals disposed of on the doctrine of the case of *Parsons v. Syracuse, B. & N. Y. R. R. Co.*, 205 N. Y., 226 (Transcript of Record, p. 220)—settled the claim for $400 which was paid by the Erie Railroad Company, and gave a receipt therefor over his official seal of office (Exhibit I, Transcript of Record, p. 193). The Consul also executed over his official seal and delivered to the defendant a release of all claims arising out of the death of said Mistschook (Exhibit J, Transcript of Record, p. 194). This money was forwarded to the Russian authorities of the province of Lutzk, in which the widow lived, and it was deposited in the Imperial Savings Bank to the account of said widow and children (Transcript of Record, p. 17). Nearly two years afterwards and on March 1, 1911, the plaintiff below, defendant-in-error, Walter G. Hamilton, was appointed public administrator (Transcript of Record, p. 190) and brought an action in the New York Supreme Court for damages for the death of said Stephen Mistschook, which resulted in a verdict for the plaintiff for $6,000.

The New York Court of Appeals, although admitting that the favored nation clause of the Russian Treaty of December 18, 1832, Article VIII., 8 U. S. Stat. at Large, 444, 448, made applicable the 27th Article of the Spanish Treaty of July 3, 1902, held that said 27th Article did not authorize the Russian Consul to represent the heirs or make said settlement, on the ground that in its opinion the claim for the death of the said Stephen Mistschook was not a part of his estate, and that the said 27th Article of the Spanish Treaty as construed ap-

plied only to estates of deceased persons, and did not cover the independent claim of the widow and next of kin given as damages to them rather than to the estate of the deceased.

Specification of Errors.

(1) The New York Court erred in holding that the settlement of the Russian Consul with the Erie Railroad Company for the death of Stephen Mistschook was not a bar (because not warranted by treaty) to the action of the administrator, plaintiff below, subsequently appointed.

(2) The New York court erred in holding that because the claim for damages for the death of Stephen Mistschook was not a part of his estate, the 27th Article of the Spanish Treaty of July 3, 1902, did not warrant the Russian Consul's representation of his absent widow and minor children.

(3) The New York court erred in holding that the 27th Article of the Spanish Treaty did not mean that the consul might represent the absent, unknown or minor heirs or next of kin of the deceased in more than matters strictly a part of his estate.

(4) The New York court erred in holding that the 27th Article of the Spanish Treaty did not authorize the Russian consul to represent the absent, unknown or minor heirs or next of kin in regard to all other rights arising out of the death here of a Russian subject.

(5) The New York court erred in deciding against the validity of the authority exercised under the United States by said Imperial Russian Consul General, at New York, acting by P. d'Adomovitsch, Vice-Consul.

(6) The New York court erred in holding that the Spanish Treaty's authority to the Consul to take steps "for the safeguarding of the property and the settlement of the estate" did not warrant the Consul's settlement herein.

(7) The New York court erred in giving judgment for the defendant-in-error.

ARGUMENT.

POINT I.

As to the powers and authority of consular officers to represent their nationals.

POINT II.

Meaning of the Twenty-seventh Article of the Spanish Treaty of July 3, 1902.

POINT III.

Immateriality of the question whether or not the claim for damages for the death of a person is a part of the estate of the deceased.

POINT IV.

Since the Twenty-seventh Article of the Spanish Treaty constituted the Consul the representative of the absent widow and next of kin, as much as a judicial appointment of an administrator or guardian, his action could not be avoided except for cause, such as proof of fraud.

POINT V.

The Russian Consul's settlement was also authorized by the second paragraph of the 27th Article of the Spanish Treaty.

POINT VI.

The judgment should be reversed.

POINT ONE.

As to the powers and authority of consular officers to represent their nationals.

A Consul is the legal representative of his absent and otherwise unrepresented countrymen, and as such he may assert their rights in court by appearing in pending proceedings and by instituting suit as their representative, and he may receive and receipt for their property. Unlike the diplomatic officers who represent their government, the Consul represents their fellow countrymen as individuals.

> " Consuls differ from diplomatic agents (by whatever name they may be known) and the latter are the representatives of one State or Government to another, while *Consuls are the representatives of the individuals of the nation sending them*, empowered to protect individual interests and to procure for their fellow-citizens, so far as possible, the same protection to their rights that they enjoy at home."
>
> Schuyler, American Diplomacy, 1886, II. " Our Consular System," pages 41, 42.

> " A consul has power to appear before any court or tribunal in case of necessity, on behalf of any member of his nation who may be absent, incapable or not well represented."
>
> Field's international Code, § 639, page 431, citing Treaty between United States and New Granada, May 4, 1850, Art. III., and Bluntschli, Droit International Codifie, § 256, 1 Kent's Commentaries, 43, to the effect that special authority from the parties in interest is not necessary.

> " Besides endeavoring to obtain redress for specific wrongs, a consul exercises a general protective supervision in respect of both the persons and property of

British subjects to guard them, so far as may be from the likelihood of injury and to afford them all reasonable assistance."

Foreign Jurisdiction of British Crown, W. E. Hall, page 74 (1894).

"In the absence of other representatives, consuls are entitled to represent their fellow-countrymen in a foreign court of admiralty without special authority."

1 Wharton's Int. Law Digest, Section 117.

"A consul, though a public agent, is clothed with authority only for commercial purposes. He has a right to interpose claims for the restitution of property belonging to subjects of his own country * * *."

Moore Dig. Int. Law, Vol. 5, Page 24, citing The Anne (1818), 3 Wheat, 435, 445; The Lilla, 2 Sprague, 177, and also Viveash v. Becker, 3 Maule & Selwyn, 284.

"They (consuls) have the right and the duty to cause to be respected in foreign countries the rights of their countrymen who are absent, or insufficiently represented, and for that purpose may take all measures which they judge necessary and proper."

Bluntschli, Droit International Codifie, Sec. 254.

"Nearly all the treaties recognize the consuls' right to address local authorities, whether judicial or administrative, to defend officially the rights and interests of their countrymen."

H. Bonfils, International Law, Section 769.

The right of a consul to represent his absent national, in asserting or defending the property rights of the latter, has been frequently recognized. Some of the cases illustrative of the attitude of the courts are here given.

In the case of *Bello Corunnes*, 6 Wheat, 151, it is clearly and conclusively held that the Spanish Consul has the right to appear for and assert the rights of his countrymen

in an action without any special power of attorney. Here the consul appeared on behalf of unknown claimants of property. Of course his appearance was without any power of attorney or special procurement of the parties in intersst.

In the *London Packet*, 1 Mason, 14, the Spanish Consul claimed goods captured on a British vessel by an American privateer on behalf of a Spanish owner, G. Marino. It was held that the consul was authorized to put in a claim on behalf of the subjects of his country.

In the case of *Rowe v. The Brig*, 1 Mason, 371, a claim was interposed by the Spanish Consul for the property as belonging to certain Spanish subjects unknown. The cargo was ordered sold and the proceeds were ordered brought into court for distribution. It does not appear that there was anywhere any objection raised to the appearance of the Spanish Consul on behalf of the unknown heirs.

In *The Anne*, 3 Wheat, 435, it was held that a consul has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country.

In the *Divina Pastora*, 4 Wheat, 510, a vessel was captured and claimed as a prize. The Spanish Consul put in a claim on behalf of the alleged Spanish owners whom he did not know. The lower court decreed restitution to the consul on behalf of the Spanish claimants. The question in the case thereafter went off on a point of pleading, but the right of the Spanish Consul to maintain his claim was never questioned.

In *The Antelope*, 10 Wheat, 66, a number of slaves were captured in a vessel hovering near the American coast. The Spanish and Portuguese Vice-Consuls put in claims for them on behalf of the alleged Spanish and Portuguese owners. It was held that the Consuls had the burden of proving the number of slaves that belonged to the subjects of their country and of designating them, but the right of either the Spanish or the Portuguese Consuls to make the claims was not denied.

In *The Ship Adolph*, 1 Fed. Cas., 87, a request was

made by the French Consul that the sheriff be directed to pay into Court the proceeds of a sale of property libeled for salvage, on behalf of the French owners who were known. It was held that a foreign consul has authority to petition the court to have paid into court the proceeds in which the citizens as subjects of his country are interested they being absent and having no other legal representatives in the United States.

In *Vujic v. Youngstown Sheet & Tube Co.*, 220 Fed. Rep., 390, the Austrian consul sued in his official capacity to require the payment to him of the amount of an award under the Ohio Workmen's Insurance Act made on account of the death of an alien, whose wife and infant son resided in Austria. The Court said :

> " The provisions of these laws and regulations are so ample, and drawn to cover such a variety of circumstances, that they leave the court no other alternative than to assume that *the consul of the dual monarchy within his district is the standing, fully authorized, and qualified personal and immediate representative, for all purposes, of a citizen of his country, residing at home,* having any interest to be cared for within the consular district, and that this authority is so complete and so unmistakable that a specific power of attorney from a home-residing citizen of his country, for whom he assumes to act here, is neither necessary to strengthen it nor capable of adding any additional force * * *."

In the case of *In re Tartaglio's Estate*, 33 N. Y. Suppl., 1121 (1895), an application was made by the Consul General of Italy at New York to have paid to him the distributive shares of the widow and five minor children in the estate of Libretto Tartaglio, deceased, an Italian subject who died leaving personal property which had been administered in this country, and which distributive shares had been deposited with the county treasurer pursuant to

a decree of the court. The court says, quoting Kent: "The practice of our courts is that a foreign consul may assert and defend as complainant party the rights and property of a person of his nation." The Court goes on to state: "The consul of a foreign nation recognized by the United States is competent to defend and watch over the interests of persons of his nation and may bring suits for such purpose without any special authority from the parties in interest."

In the case of *Fattosini's Estate*, 67 N. Y. Suppl., 1119, the Court said: "It has been said that a foreign consul without specific authority has the general right to protect the rights and property of a person of his nation within the jurisdiction of his consulate."

In the case of *Succession of Rabasse*, 47 La. Ann., 1452, 17 So., 867, the Court says: "In our view, the stipulation in this treaty (meaning the treaty between the United States and France) puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs." And on a rehearing the Court says: "Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French consul, with the same effect as if the delegate held their power."

In *Matter of Davenport*, 43 Misc., 578 (N. Y.), the *Tartaglio* decision was followed by the Surrogate, who held that the Italian Consul was entitled to receive the balance belonging to the next of kin of a deceased Italian subject, when the next of kin resided in Italy. That case is pertinent to the one at bar, in that there had been an administration upon the estate, the public administrator held the balance of the estate which belonged to the next of kin, and the administrator was directed by the Surrogate to pay over the proceeds to the Consul. In the case at bar the plaintiff is the public administrator, and if, under the *Davenport* decision the Consul is authorized to take the proceeds of this suit from

the plaintiff, then the Consul must have had the right to take the proceeds of the claim for the death of the deceased from the defendant in the first instance and before the public administrator had been appointed. Otherwise we have the absurd result, if the judgment in this case is paid to the plaintiff, that he will be required to turn over such proceeds to the Consul, who has already settled the claim.

In his function as protector and preserver of the interests of absent claimants, no greater power is involved in receiving and receipting for property arising from the death of a deceased alien than in appearing in legal proceedings and engaging in the trial of causes on behalf of the absent claimants. In the *Tartaglio* case *(supra)* it was said :

> " The right to demand and sue for necessarily implies the authority to acquit and release."

In each of the following cases the court recognized in one form or another the right of a consul to represent his absent national in appearing in, instituting, or receiving the proceeds of, a litigation.

In re Szabo's Estate, 143 N. Y. Supp., 678.
The Gen. McPherson, 100 Fed., 860.
Carpigiani v. Hall, 172 Ala., 287 ; 55 So. Rep., 248.
The Elizabeth, Fed. Cas., No. 4350.
The Conserva, 38 Fed. Rep., 431.
Harrison v. Vose, 9 How., 372.
In re Holmberg, 193 Fed. Rep., 260.
von Thodorovick v. Franz Joseph Assc'n., 154 Fed. Rep., 911.

POINT TWO.

Meaning of the Twenty-seventh Article of the Spanish Treaty of July 3, 1902.

The rights given by the New York statute for the death of a decedent are property rights belonging to the persons for whom the cause of action was created.

Matter of Meekin v. B. H. R. R., 164 N. Y., 145.

And a payment to the beneficiaries named in the statute is a bar to any subsequent action of an administrator.

McGurty v. New Amsterdam Co., 115 N. Y. Appellate Division, 668.
Matter of Brennan, 160 N. Y. Appellate Division, 401.
Mella v. Northern S. S. Co., 127 Fed. Rep., 416.
See Note, *Lawyers' Rep. Ann.* (N. S.), p. 207.

If, therefore, the Russian Consul was authorized to represent the widow and next of kin under the applicable treaty provisions, his acts must bind them and no recovery can be had by the public administrator in this suit.

The first paragraph of the 27th Article of the Spanish Treaty upon which plaintiff in error relies is as follows :

"ARTICLE XXVII.

> The Consuls-General, Consuls, Vice Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own Government, so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction ; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear."

The New York Court of Appeals in this case held that the 27th Article of the Spanish Treaty of July 3, 1902, did not authorize the Russian Consul's settlement herein, and based its opinion upon a construction of this article as applying only to *estates* of deceased persons and matters relating thereto. Thus the court, speaking through Mr. Justice COLLIN, in Hamilton v. Erie Railroad Company, 219 N. Y., 343, said :

First, at page 350 (transcript of record, p. 222) :

> " At the outset it should be comprehended that under our statute the cause of action is created by the statute and is original and not derivative. It is not a part of, and has no relation with, the estate of the decedent."

Again, at page 353 (transcript of record, p. 224) :

> " A careful reading of the provisions of the treaty impels to the conclusion that the governments contemplated the assured conservation, administration and settlement of the estates of the citizens of either who died in the country of the other, or dying at sea, left property which was brought into the country of the other. It is the heirs, next of kin or legal representatives of such citizens who are to be represented and represented as such ; that is, as having an ownership or interest under the laws of intestacy in the estate of the deceased."

And still again, at page 354 (transcript of record, p. 224) :

> " The existence of an estate of the intestate in the consular district is the ground for the right to represent. The remaining language of the treaty provision denotes that the intention of the governments was to provide by it for the safeguarding of the property and the settlement of the estates of the citizens of either dying in the country of the other or at sea. The language has a completed purpose and effect if it be

held to authorize the consular officers to act for the heirs, next of kin or legal representatives of their countrymen, of the description set forth, in relation to their estates * * *."

I. The construction given to this Article by the Court of Appeals is clearly opposed to the intention of the parties to the treaty and to the reasons which existed for the enactment of this provision. It was clearly intended to authorize the Consul, under the circumstances stated, to represent and generally protect the rights of absent or minor heirs in any way growing out of the death of the deceased. In other words, prior to the appointment of an administrator, to do everything which an administrator might do.

The circumstances which suggested and determines this grant of authority is not the nature of the rights or property to be administered but the helpless condition of the absent alien heirs. And clearly any right which they may have growing out of the death of the deceased requires and should be entitled to such protection.

No conceivable reason can be suggested why the Consul should be allowed to represent such absent, perhaps, minor, alien heirs in respect of one kind of right or class of property to which they are entitled by reason of the death of the deceased rather than another. Their need of help is just as great in one case as another and it was to relieve this need that this power was given to their consular representatives.

There can be no possible reason why the Consul should be allowed to represent such heirs in respect of a claim which their father may have had, and not in respect of a claim which the statute gives to his representative for their benefit for damages caused by negligence resulting in his death. This interpretation of the article does not require the effect suggested by the Court of Appeals that the Consul's authority would relate to *all* rights of absent heirs. The provisions concern the protection of property of a deceased alien and the

rights which accrue to the absent relatives from the death, and we submit that such is the plain purpose of the treaty.

II. It appears from the Spanish text that the New York Court of Appeals misconstrued the scope of this 27th Article of the Spanish Treaty by deciding that it did not allow representation of the heirs or next of kin except in connection with the property of the deceased in distinction from their rights generally, arising or accruing to them by reason of the death of the deceased, and interpreted the word "estate" in the last clause of the first paragraph too literally and technically instead of affording to it the broader meaning intended by the law-makers.

This Twenty-seventh Article of the Spanish Treaty (as given in 33 Statutes at Large, under "Treaties and Conventions") in the two languages is as follows:

"ARTICLE XXVII.

The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the respective High Contracting Parties shall have, under the laws of their country and the instructions and regulations of their own Government, so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea whose property is brought within their consular district; and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs

"ARTÍCULO XXVII.

Los Cónsules-Generales, Cónsules, Vice-Cónsules y Agentes Cónsulares de las respectivas Atlas Partes, Contratantes, tendrán, conforme á las leyes de su pais y á las instrucciones y reglamentos de su propio Gobierno, en cuanto sean compatibles, con las leyes locales, el derecho d representar á los herederos ausentes, desconocidos ó menores de edad, parientes immediatos ó representantes legales de los ciudadanos ó subiditos de su pias, que mueran dentro de su jurisdiccion consular; asi como de aquellos de sus compatriotas que mueran en el mar, cuyos bienes sean llevados á su demarcación consular; y de comparecer

or legal representatives shall themselves appear.

Until such appearance the said consular officers shall be permitted, so far as compatible with local laws, to perform all the duties prescribed by the laws of their country and the instructions and regulations of their own Government for the safe-guarding of the property and the settlement of the estate of their deceased countrymen.

In every case the effects and property of such deceased citizens or subjects shall be retained within the consular district for twelve calendar months by said Consuls-General, Consuls, Vice-Consuls or Consular Agents or by the legal representatives or heirs of the deceased during which time the creditors, if any, of the deceased shall have the right to present their claims and demands against the said effects and property, and all questions arising out of such claims or demands shall be decided by the local judicial authorities in accordance with the laws of the country to which said officers are commissioned."

personalmente, ó por medio de delegado que los represente en todos los procedimientos relativos al arreglo de sus bienes, hasta que los herederos ó representantes legales comparezcan por si mismos.

Hasta que tenga lugar esta comparencia podrán dichos funcionarios consulares, en cuanto sea compatible con las leyes locales, cumplir todos las deberes prescritos por las leyes de su pais y las instrucciones v. reglamentos de su propio Gobierno para la custodia de la propiedad y arreglo de los bienes de su difunto compatriota.

En todo caso, los efectos y bienes de los ciudadanos ó súbitos difuntos serán retenidos dentro del distrito consular durante doce meses naturales, por dichos Cónsules-Generales, Cónsules, Vica-Consules ó Agentes Consulares, ó por los representantos legales ó herederos del difunte, durante cuyo tiempo los acreedores de aquel, si los hubiere, tendrán derecho para presentar sus reclamaciones y demandas contra dichos efectos y bienes; y todas les cuestiones que se susciten con motivo de estas reclamaciones ó demandas, so decidirán por las autoridades judiciales locales con arreglo á las leyes del pais en que dichos funcionarios están nombrados."

The article as a whole is designed to protect, in case of the death of a subject of one of the two contracting parties in the territories of the other, first, the rights of the absent, or (whether absent or present) unknown or minor heirs or next of

kin—all these classes needing some representative,—which may arise out of that death ; and second, the rights involved in his estate.

The first paragraph of this article, then, deals with the rights of the living, while the last two paragraphs deal with the estate itself of the deceased. This is made clear by an examination of the Spanish text. It shows that the first paragraph gives Consuls the right to represent the absent and minor heirs or next of kin of their compatriots dying within their Consular jurisdiction, as well as the heirs or next of kin *of* those ("de aquellos") dying at sea "whose *property*" ("cuyos *bienes*") is brought within the Consular district; and of appearing in their behalf—behalf of the heirs or next of kin—in the settlement of their rights ("de sus *bienes*")—that is, the rights of the heirs or the next of kin—until these heirs themselves appear to look after their own interests. The translation of the Spanish words "que los represente" into the English "in their behalf" is also questionable, and it would more closely follow the Spanish text if translated "who would represent *them*," and thus clearly indicate that the representation of the Consul was for the absent next of kin. The word "their" appears twice in the last clause of the first paragraph and it can only relate to the living next of kin. The Consul is authorized to appear "in *their* behalf in all proceedings relating to the settlement of *their* estate until such heirs or legal representatives shall themselves appear," Of course, the Consul could not appear for the deceased, and such appearance could only be for the absent or minor heirs or next of kin. The words "their estate" which follow must also refer to the rights or property of the absent next of kin and not the estate of the deceased which may be conserved and administered under the local laws as provided by the second and third paragraphs of the article.

That the last clause of the first paragraph regarding the Consul's right to appear "in all proceedings relating to the

settlement of their estate until such heirs or legal representatives shall themselves appear," does not refer to the estate of the deceased seems conclusively established by the fact that the second paragraph immediately proceeds to provide that the consular officers shall be permitted to perform appropriate duties "for the safe-guarding of the property and the settlement of the estate of their deceased countrymen." Otherwise, the last part of the first paragraph amounts to nothing more than a needless assertion of rights included in the scope of the second paragraph. For any act authorized by the last clause of the first paragraph—if interpreted as referring to the estate of the deceased—would certainly be included in the scope of the second paragraph.

Furthermore, the English word "estate" used in the last clause of this paragraph, and which the Court of Appeals held limited the entire paragraph to matters relating to such an estate, is not the equivalent given for the Spanish word "bienes" in the earlier part of the paragraph, and is misleading, because it instinctively suggests a reference to the property left by the deceased rather than to the property claims of the heirs or next of kin, thus making the adjective "their" (used in connection with this word "estate") appear to have reference to the deceased rather than to the heirs or next of kin. It will be observed that in the first paragraph, where reference is made to the property of seamen brought into the Consular district and twice in the third paragraph, the meaning of the word "bienes" is rendered, not as "estate" but as "property." If the word "property" is substituted for the word "estate" in the last clause of the first paragraph, which is the English equivalent for the Spanish word "bienes" that is generally employed elsewhere in the Article, the meaning of the paragraph is clear and supports the authority of the Consul to represent his absent living countrymen. The Court of Appeals based its decision upon the use of the word *estate* as indicating that only the property of the deceased was

dealt with in the paragraph and if the word "property" is used, as it is usually in the Article where the Spanish word "bienes" appears, instead of the word "estate," the reasons assigned for the Court of Appeals ruling cannot be asserted.

It must, therefore, follow that the representation and appearance in proceedings set forth in the first paragraph of the article is a representation and appearance in behalf of living heirs or next of kin of the deceased in respect of all their rights arising from the death, and is not in behalf of those persons only in respect of their interest in the estate of, or property left by, the deceased. The reasons for a representation in regard to the statutory claim for damages accruing to the absent aliens are the same as for a representation in regard to the property of the deceased, which may be termed his estate. And there is no reason why the powers of the consul should be limited to rights in the estate as such. We submit the construction claimed was the intention of the parties to the treaty, and the language itself does not reasonably bear any other construction.

It will be noticed that the second paragraph of this 27th Article deals with the protection of estates of deceased subjects, while the third paragraph deals with the fulfillment of obligations, and thus the entire subject of rights and liabilities arising out of the death of a subject of one country in the territory of the other is provided for by the terms of the article.

Regarding a treaty drawn up in two languages: In *U. S. v. Percheman*, 7 Pet. 51, the Court (when construing the language of the eighth article of the Spanish Treaty of February 22, 1819, which provided that the grants of lands situate in the territory ceded by Spain "shall be ratified and confirmed", or according to the Spanish version "shall remain ratified and confirmed") reversed its previous construction, based on the English text only, made in *Foster & Elam v. Neilson*, 2 Pet. 253, 314, 315, to the effect that the language was that of contract and not self-executing and held, at pages 88 and 89 of the

Percheman case, that in reconciliation with the Spanish text the language was self-executing and meant that the grants, were thereby ratified.

The Court said :

> " The treaty was drawn up in Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical. The Spanish has been translated, and we now understand that the article, as expressed in that language, is, that ' grants shall remain ratified and confirmed to the persons in possession of them, to the same extent, &c.'--thus conforming exactly to the universally received doctrine of the law of nations. If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. * * * No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words ' shall be ratified and confirmed,' are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they ' shall be ratified and confirmed ' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable."

That in the 27th Article of the Spanish Treaty of July 3, 1902, the rights of the living were within the intention of the contracting parties, it will be noted that in Article 21 of the same treaty it is provided that the Consul may apply to the national or local authorities for the protection of the rights and interests of their fellow countrymen, " whom, if absent, such Consular officers shall be presumed to represent."

III. Even if the word " estate " is held to be appropriately employed in the first paragraph, yet the question still arises, under the treaty provisions above quoted, whether the Consul possessed the authority to represent his coun-

trymen residing in Russia, to collect the claim and give acquittance therefor. It will be observed that the designated powers of the Consul are cumulative, and they do not qualify nor construe one another. The language is that "The Consuls-General * * * shall have * * * the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; as well as those of their countrymen dying at sea * * *; *and* of appearing * * * in all proceedings relating to the settlement of their estate * * *."

The clauses contemplate a representation of the absent aliens as regards their rights arising from the death of a compatriot, as well as a representation in judicial proceedings regarding the estate of the deceased. The right to appear in proceedings relating to the *estate* of the deceased countryman is an additional right to that expressed in the earlier clauses of the paragraph, namely, the right to *represent* the absent heirs and next of kin. Furthermore, the right of representation is, by the terms of the treaty, only limited by the laws and instructions of the foreign government and the local laws, and to say that the representation of the absent heirs or next of kin is authorized only in respect of the estate of the deceased in which such heirs or next of kin may be interested is, we submit, to do violence to the very language of the treaty.

The words in the 27th Article "represent," is aptly used to constitute the Consul the agent of the absent subjects as if with an express power of attorney from them to collect their claims through suit or settlement, as the exigencies of the case should seem to warrant. The United States Supreme Court in *Mutual Life Insurance Co. v. Armstrong*, 117 U. S., 591, 597, said that "The term 'legal representatives' * * * is sufficiently broad to cover all persons who, with respect to his property stand in his place and represent his interests, whether transferred to them by his act or by operation of law."

Beall v. Elder, 34 La. Ann., 1098, 1099, held, where a statute providing a mode for reviving judgments directed that suits should be filed against the original defendant or his representative, that:

> "It is well settled in our jurisprudence, that the word 'representative,' as used in this statute, 'simply means the agent or attorney in fact, if the defendant be living, or the executor, curator or administrator or heir, as the case may be, if he be dead.' Chapman v. Nelson, *et al.*, 31 Ann., 343."

There was no local law which was incompatible that the acts of the Consul of the Russian Government. The Russian Consul is, then, by virtue of the treaty, with the consent of the United States, the legally constituted representative of the absent heirs or next of kin—his Government's subjects—and they, in turn, his wards, so to speak, and his act was binding upon them.

POINT THREE.

Immateriality of the question whether or not the claim for damages for the death of a person is a part of the estate of the deceased.

With this meaning of the treaty fixed then, as discussed in Point One, it becomes entirely immaterial as to whether the right to damages suffered by the widow and minor children by reason of the death of said Stephen Mistschook was a part of his estate in which they might be legally entitled to participate regardless of a contrary will or not, or whether their right to damages belonged directly to them as compensation for their loss arising from the death of said Stephen Mistschook. In either case their Government, the Russian Government, with the consent of the United States, in a treaty which is, in the United States, the supreme law of the land, had agreed that they should be represented by the Russian Consul.

POINT FOUR.

Since the 27th Article of the Spanish Treaty constituted the Consul the representative of the absent widow and next of kin, as much as a judicial appointment of an administrator or guardian, his action could not be avoided except for cause, such as proof of fraud.

By the supreme law of this land then, the New York courts were bound to recognize the Russian Consul as the representative of his absent compatriots—the widow and children. The Russian Consul was thereby legally constituted their agent. His receipt, Exhibit I, was proof of the settlement. His release, made in the name of the widow, Irene Mistschook, Exhibit J, bound not only her, but the children, who were all minors. They could not impugn the action of their agent, the Consul, so long as he acted without fraud and within the scope of his authority. The official acts of a Consul are *ipso facto* presumed to be within his authority from his home Government. In *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S., 319, 327, Mr. Justice McReynolds said :

> " It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law ' presumes that every man, in his private and official character, does his duty until the contrary is proved ; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the

maxim, *omnia presumuntur rite et solemniter esse acta, donnec probetur contrarium.*' "

Bank of the United States v.Dandridge, 12 Wheat., 64, 69, 70.

Knox County v. Ninth National Bank, 147 U. S., 91, 97.

Maricopa & Phoenix R. R. v. Arizona, 156 U. S. 347, 351.

Sun Publishing Assn. v. Moore, 183 U. S., 642, 649.

There was, of course, no fraud or attempted proof thereof. The only evidence was that Irene Mistschook refused to accept the $400 tendered her by the Russian Government. But she could not disown the action of her authorized agent, the Consul. Nor would it be fair for her to have an election, to be exercised after verdict, as between the settlement of the Consul and the uncertain outcome of the administrator's suit. The action of the Consul is presumed to have been for the interest of the absent aliens, and the American authorities are not concerned in the propriety of his conduct, and they will have performed their full function in giving effect to his actions.

POINT FIVE.

The Russian Consul's settlement was also authorized by the second paragraph of the 27th Article of the Spanish Treaty.

Even if it were to be held that the treaty's grant of power to the Counsel to represent the absent, unknown or minor heirs did not authorize the action of the Russian Consul in this case, yet the treaty would still furnish authorization for his act by the second paragraph of its 27th Article—providing that until the appearance of the heirs the Consul may do, so far as

compatible with local laws, all things authorized by his home Government "for the safeguarding of the property and the settlement of the estate of their deceased countrymen",—because while it is true that the damages for death technically do not belong to the estate, still they are undoubtedly within the scope of the meaning of the language. Surely the framers of the treaty meant to protect the deceased as to all rights that accrued from his death to those for whom he cared and whom he might be bound, while living, to support—his wife and minor children. A thing may be within the meaning of a law though not within its literal language for the intention of the lawmaker governs. *Hawaii v. Mankichi*, 190 U. S., 197, 212, *et seq.*

POINT SIX.

The judgment should be reversed.

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Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
against (*Defendant below*),

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels, and Credits of STEPHEN MISTSCHOOK, Deceased,
Defendant-in-Error,
(*Plaintiff below*).

Supplemental Brief for the Erie Railroad Company, Plaintiff-in-Error.

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WILLIAM C. CANNON,
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Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 112.

ERIE RAILROAD COMPANY,
Plaintiff-in-Error,
(Defendant below),

AGAINST

WALTER G. HAMILTON, County Treasurer of the County of Rockland, as Public Administrator of the Goods, Chattels and Credits of Stephen Mistschook, Deceased,
Defendant-in-Error,
(Plaintiff below).

SUPPLEMENTAL BRIEF FOR ERIE RAILROAD COMPANY.

The purpose of this supplemental brief is to present a point urged in the New York State courts in this action, but omitted from the main brief filed upon the present appeal.

SUPPLEMENTAL POINT.

The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in holding that Defendant's Exhibit K for Identification and Defendant's Exhibit L for Identification were not admissible in evidence.

Plaintiff-in-Error, by its amended answer, pleaded a settlement, release, accord and satisfaction of the claim upon which this action was brought (Transcript of Record, pp. 6, 7). The release was given by the Russian Consul, at New York, in whose jurisdiction the deceased resided and where his death took place (Transcript of Record, p. 109), on behalf of the widow and next of kin of the deceased (Transcript of Record, pp. 109, 110, 193, 194). The issue was raised upon the trial whether or not the widow of the deceased accepted and ratified the action of the Russian Consul on her behalf (Transcript of Record, pp. 16, 17, 176, 177). Upon this issue the Plaintiff-in-Error offered in evidence a copy in Russian and a translation of a receipt of the widow for 770 rubles and 80 kopeks "sent" to her "as compensation" for the death of the deceased, and a copy in Russian and translation of a communication from the Governor of Volhynia, Chamberlain of the Court of the Imperial Majesty of Russia, acknowledging the receipt of the 770 rubles and 80 kopeks sent by the Russian Consulate General at New York, and forwarding the above mentioned receipt of the widow therefor to the said Consulate. These documents were rejected over the exception of the Plaintiff-in-Error (Transcript of Record, pp. 176, 177, Exhibits K and L for Identification, pp. 195, 196).

It appears from the testimony of Irene Mistschook, the widow, that 770.80 rubles, Russian money, had been deposited by the Justice of the Peace of Luck in the Imperial

Savings Bank at Luck to the credit of the heirs of the deceased. It was deposited in March, 1910, having been sent to the Governor of Volhynia and by him sent to the Justice of the Peace at Luck (Transcript of Record, pp. 16, 17). The widow of the deceased resided in the said Province of Volhynia (Transcript of Record, p. 13). She testified that she refused to accept this money (Transcript of Record, p. 17). In this state of the evidence the Plaintiff-in-Error was entitled to contradict this testimony as well as to show that the money which had been paid to the Russian Consulate at New York City in settlement of the claim for the death of the deceased had been paid to and accepted by her, and was, at least as to the widow, an accord and satisfaction of her claim, and a ratification of the action of the Russian Consul, binding upon her even though the settlement and release of the Russian Consul would otherwise have been ineffective. It will be observed that the receipt, Exhibit K, was signed by the widow, through an officer of the Trostianzy Volost, and the translation of the Russian document was certified to be correct by and under the seal of the Imperial Russian Consulate General at New York. The communication from the Governor of Volhynia, forwarding the receipt, was similarly authenticated (Exhibit L).

These documents were rejected, not as being immaterial, but apparently on the ground that the widow did not sign the receipt in person and that the documents were not properly proved (Transcript of Record, p. 177). The Court of Appeals of the State of New York held that there was no meritorious exception on the part of Plaintiff-in-Error to the rulings of the trial justice in rejecting evidence (Transcript of Record, p. 225). The propriety of the ruling now in question is presented to this Court under the fourteenth assignment of error (Transcript of Record, p. 212).

The documents in question were competent proof and should have been admitted under the provisions of various

treaties, applicable by reason of the " most favored nation " clause in the treaty with Russia.

Treaty with Belgium, 1880, Art. X., 1 Malloy, 97.

Treaty with France, 1853, Art. VI., 1 Malloy, 530–531.

Treaty with Greece, 1902, Art. X., 1 Malloy, 858.

Treaty with Italy, 1878, Art. X., 1 Malloy, 980.

Treaty with Germany, 1871, Art. IX., 1 Malloy, 552–553.

The treaty with Germany provides as follows :

" Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two countries, or their Chancellors, shall have the right, conformably to the laws and regulations of their country, * * *

" 2. To receive and verify unilateral acts, wills and bequests of their countrymen, and any and all acts of agreement entered upon between citizens of their own country * * * and the citizens or other inhabitants of the country where they reside ; * * *

" All such acts of agreement and other instruments, and also copies and translations thereof, when duly authenticated by such Consul-General, Consul, Vice-Consul or Consular Agent, under his official seal, shall be received by public officials and in courts of justice as legal documents, or as authenticated copies, as the case may be, and shall have the same force and effect as if drawn up or authenticated by competent public officers of one or the other of the two countries."

Under the provisions referred to, and particularly under those quoted, it would seem clear that Exhibits K and L for Identification were erroneously excluded. Even if it be held that the Russian Consul exceeded his authority in presuming to settle the claim on behalf of the widow and others, it is nevertheless true that the amount of the settlement was tendered to the widow through the Russian Consul, and her act by way of acceptance thereof, " as compensation " for the death of the deceased (as appears from the excluded evidence), was an " act of agreement," and

if it should be deemed not a technical agreement, it was at the very least a "unilateral act" within the meaning of the German treaty. The receipt is no less the act or agreement of the widow because she did not sign it in person. The receipt purports to have come through the regular channels in the regular course of the official consular business, and upon formal authentication by the Consul it is to be presumed that it was executed conformably to the laws of Russia (See Agency of Canadian Car & Foundry Co. vs. American Can Co., 253 Federal Rep., 152).

It would be mere quibbling over words to contend that the Russian Consul certified only to the correctness of the *translation* of a nondescript and unauthenticated writing in Russian. It is not the function of Consuls to act in a merely clerical capacity as translators of the Russian language. If such were the only significance of the consular certification, then the affixing of the consular seal thereto would be meaningless. It could add nothing to a correct translation nor could it give any validity to a bad translation. Obviously the certification under seal was intended, and should be construed, as a formal authentication by the Consul of the documents in question, made for the purpose of facilitating the transaction of business between his national and a citizen of New York in accordance with his duties and his rights under treaty.

The rejection of these duly authenticated documents wsa an error requiring a reversal of the judgment of the Supreme Court of the State of New York.

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ERIE RAILROAD COMPANY *v.* HAMILTON, COUNTY TREASURER OF THE COUNTY OF ROCKLAND, AS PUBLIC ADMINISTRATOR OF MISTSCHOOK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 112. Argued December 19, 1918.—Decided January 7, 1919.

Under § 237 of the Judicial Code, as amended September 6, 1916, a judgment of a state court based on a construction, but not denying the validity, of a treaty, is not reviewable by writ of error from this court.

Writ of error to review 169 App. Div. 936; 219 N. Y. 343, dismissed.

THE case is stated in the opinion.

Mr. William C. Cannon, with whom *Mr. Frederic B. Jennings* and *Mr. Harold W. Bissell* were on the briefs, for plaintiff in error.

Mr. Herbert C. Smyth, with whom *Mr. Frederic C. Scofield*, *Mr. Charles Angulo* and *Mr. Charles C. Sanders* were on the briefs, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Erie Railroad Company was sued in the State of New York by the defendant in error to recover damages

for the claimed negligent causing of the death of Stephen Mistschook, who was a subject of the Emperor of Russia and who left surviving him a wife and three children resident in Russia.

After denying negligence and liability, the company averred that it had settled the claim with the Russian Consul resident at New York, who, acting under authority of the treaties between the United States and the Emperor of Russia, and in behalf of the widow and next of kin of the deceased, had executed in due form of law and, for the consideration of $400, had delivered a release of all claims and demands arising from the death complained of.

The claim at the trial was not, and it is not now, that the Russian Treaty of 1832 (8 Stat. 444, 448, Art. VIII,) in terms gave the consul the power to make the settlement relied upon, but that under the treaty of the United States with Spain, invoked through the "favored nation" paragraph of the Russian treaty, he had power to make it.

The trial court held that the Russian consul had no authority to make the settlement pleaded or to give a valid release, and the judgment recovered by the plaintiff (the defendant in error), affirmed by the proper Appellate Division of the Supreme Court and by the Court of Appeals, is argued as if properly before us for review on writ of error.

Since the judgment which the plaintiff in error seeks to review was entered on December 12, 1916, the record presents the question whether writ of error or writ of certiorari was the appropriate remedy for bringing the case into this court under § 237 of the Judicial Code, as amended by Act of Congress, approved September 6, 1916 (39 Stat. 726).

From the statement of the case which we have made it is clear that the railroad company has relied throughout the litigation upon the validity of the treaty of the United States with Russia and that it has claimed rights under a

construction of that treaty which were denied by the defendant in error and by the New York courts. What the proper construction of the treaty is, is the only question argued in this court.

The only provisions of the Act of September 6, 1916, applicable to the review of such a case as we have here are these:

"A final judgment . . . in the highest court of a State in which a decision in the suit could be had, where is drawn in question the *validity* of a treaty . . . of . . . the United States, and the decision is against their [its] validity . . . may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error . . .

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is claimed under . . . any treaty . . . and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such . . . treaty . . . "

Since, as we have seen, the plaintiff in error has not assailed the validity of the Russian treaty but on the contrary has claimed under an asserted construction of it, which was denied, it is clear that the case cannot come into this court by writ of error, under the statute quoted. At most the railroad company asserted a right under the treaty which was denied to it by the state courts and this under the plain reading of the statute could give it a right to review here only by writ of certiorari.

The distinction between assailing the validity of a treaty or of a statute and relying upon a special construc-

tion of either is patent and has been the subject of such full discussion by this court that it should not now be considered either doubtful or obscure. *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210; *District of Columbia* v. *Gannon*, 130 U. S. 227; *Louisville & Nashville R. R. Co.* v. *Louisville*, 166 U. S. 709, 715; *United States* v. *Lynch*, 137 U. S. 280, 285; *South Carolina* v. *Seymour*, 153 U. S. 353, 358; *United States ex rel. Taylor* v. *Taft*, 203 U. S. 461, 464; *Stadelman* v. *Miner*, 246 U. S. 544.

For want of jurisdiction the writ of error is

Dismissed.